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In the Supreme Court of the United States

OCTOBER TERM, 1974

FEDERAL POWER COMMISSION, PETITIONER

v.

JOHN E. MOSS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

JOHN E. MOSS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–27a) is reported at 502 F. 2d 461. The initial order (No. 455) of the Federal Power Commission (App. D, *infra*, pp. 31a–51a) and its order (No. 455–A) denying rehearing (App. E, *infra*, pp. 52a–57a) are reported at 48 FPC 218 and 48 FPC 477, respectively.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 28a) was entered on August 15, 1974, and the Commission's timely petition for rehearing was denied on September 19, 1974 (App. C, *infra*, pp.

29a–30a). On December 12, 1974, the Chief Justice extended the Commission's time for filing a petition for a writ of certiorari to and including January 17, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission may, upon a proper finding of public need, simultaneously authorize both the sale of natural gas in interstate commerce by a producer and the abandonment of the sale at a future date certain.

STATUTES INVOLVED

Sections 4, 5, 7, and 16 of the Natural Gas Act, as amended, 15 U.S.C. 717c, 717d, 717f, and 717*o* are set forth in Appendix F, *infra,* pp. 59a–67a.

STATEMENT

1. On August 3, 1972, the Federal Power Commission, as part of its continuing effort to alleviate the worsening shortage of natural gas, issued Order No. 455 (App. D, *infra,* pp. 31a–51a) establishing an "optional procedure for certificating new producer sales of natural gas" (*id.* at 31a). The procedure is designed to "stimulate and accelerate domestic exploration and development of natural gas reserves" (*id.* at 38a) by permitting the Commission to "certificate sales of gas not previously deliverable to the interstate market at prices which are shown to be in the public interest" and to "lessen rate uncertainty which has prevailed since the early 1960's" (*id.* at 32a).

The Commission found that natural gas producers were frequently unable to rely upon the rates established by the Commission in its area rate orders, because those orders were subject to lengthy appellate review. "Consequently there is no assurance at the present time that a producer may not ultimately have to refund some of an initial rate * * * upon which the producer relied when it dedicated a new gas supply to the interstate market" (*id.* at 35a–36a). "This uncertainty," the Commission found, "has impeded domestic exploration and development" (*id.* at 36a). "[T]he producer does not know * * * how much it will get if it develops and sells new gas to the interstate market. The producer knows for sure only that once it sells in interstate commerce it cannot stop deliveries" (*ibid.*).

Under the optional procedure established by Order No. 455, producers may tender for the Commission's approval contracts for the sale of new natural gas at rates that may exceed the maximum authorized by the applicable area rate order (*id.* at 46a). The Commission may then determine in a single proceeding whether the "public convenience and necessity" under Section 7(c) of the Act, 15 U.S.C. 717f(c), warrants the issurance of a certificate authorizing the sale and whether the rates called for by the contract, including any definite increments during the life of the contract, are "just and reasonable" under Section 4(a), 15 U.S.C. 717c(a) (*id.* at 47a; App. E, *infra,* p. 57a). A permanent certificate issued by the Commission and accepted by the producer is not subject to change in later proceedings under Section 4 of the Act, 15

U.S.C. 717c, and the rates may be collected without risk of refund obligations (App. D, *infra,* pp. 39a, 46a).[1]

At the time that it issues a permanent certificate of public convenience and necessity, the Commission may also authorize the producer—upon appropriate findings of public need under Section 7(b) of the Act, 15 U.S.C. 717f(b)—to abandon the sale at the end of the contract term (*id.* at 46a; see also App. E. *infra,* p. 55a). In that event, the producer would be free when the contract expires to withdraw the gas from interstate commerce without having to demonstrate again that abandonment is consistent with the public convenience and necessity. Pre-granted abandonment authority thus would give a producer assurance that his present sale will not indefinitely commit the gas to what may be a lower-priced interstate market.

In return for the rate certainty (and, in some cases, abandonment assurance) made possible by Order No. 455, a producer who accepts a permanent certificate issued under the order "waive[s] all rights to seek future rate increases under Section 4 * * *, other than price escalations" called for by the contract and certificated by the Commission (App. D, *infra,* p. 47a). In addition, the contract may not contain certain in-

[1] The Commission recognized that it "cannot bind a future Commission not to invoke the *prospective* operation of Section 5" of the Act, 15 U.S.C. 717d, to alter the rates called for by the contract (App. D, *infra,* p. 36a; emphasis added). It stated, however, that, "[t]o the extent that this Commission can grant certainty of rates, we do so" (*ibid.*).

definite price escalation clauses (*ibid.*),[2] and the producer who accepts a permanent certificate waives his right to benefit from any contingent escalations of the price of flowing gas provided for under the applicable area rate order (*id.* at 43a–44a, 47a).

2. Petitions for review were filed attacking the optional procedure on a variety of grounds. The court of appeals, however, upheld the Commission's order in all respects save one (App. A, *infra,* pp. 1a–27a). It ruled that pre-granted abandonment authority would be improper under Section 7(b) of the Act, 15 U.S.C. 717f(b) (*id.* at 20a–21a).[3]

The court reasoned that Section 7(b) requires a finding by the Commission at the time of the proposed abandonment, not at the time of certification, that the abandonment is consistent with the public convenience or necessity. It stated (*ibid.*):

> Pregranted abandonment would leave a producer free to discontinue service to the inter-

[2] A common feature of contracts filed under the area rate procedures, for example, is an "area rate clause" that permits the seller to increase his rates to reflect increases in the applicable area maximum rate levels.

[3] Section 7(b) provides:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

> state market, perhaps years after the original certification, with no contemporaneous obligation on the producer to justify withdrawal of service as consistent with the public convenience and necessity. We think Section 7(b) does not contemplate or authorize such procedure.
>
> * * * It appears to us * * * that pregranted abandonment requires more clairvoyance than even the Commission's expertise reasonably encompasses.

The court of appeals was "fortified in [its] conclusion" (*id.* at 21a) by its reading of this Court's decision in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, which upheld the Commission's authority to tender a certificate without time limitation to a producer who applied for a certificate limited in time to the duration of the underlying contract for the sale of gas.

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals, insofar as it set aside the pre-granted abandonment provision of Order No. 455, conflicts with decisions of this Court and the Tenth Circuit, which establish that the Commission, at the time it issues a certificate of public convenience and necessity for the sale of natural gas by a producer, has authority under the Natural Gas Act simultaneously to approve the future termination of the service.

In *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 239 F. 2d 97 (C.A. 10), reversed on other grounds, 353 U.S. 944 (hereinafter *Sunray I*), a natural gas producer sought certificates authorizing sales

in interstate commerce and requested that the certificates be limited in time to expire coextensively with the terms of the underlying contracts. The Commission issued the certificates but refused to limit them as to time, taking the position, like the court of appeals in the present case, that termination of the service could be authorized only under Section 7(b) of the Natural Gas Act and, implicitly, only at the time when termination was proposed to become effective (see 14 F.P.C. 877).

The Tenth Circuit held, however, that the Commission's power under Section 7(e) of the Act, 15 U.S.C. 717f(e),[4] to attach reasonable conditions to its certificate authorizations includes the power "in a proper case * * * [to] grant certificates of convenience and necessity for periods of limited duration" (239 F. 2d at 100). Moreover, contrary to the holding of the court of appeals in the present case, the Tenth Circuit concluded that Section 7(b) is no bar to authorizing future termination of service at the same time that the service itself is authorized. "Section 7(b) is clearly not intended to be a restriction upon the powers granted in Sections 7(c) and 7(e)" (*id.* at 101).[5]

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[4] The provisions of Section 7(e) are set forth at App. F, *infra*, p. 65a.

[5] The Tenth Circuit affirmed the Commission's refusal to limit the certificate as to time, however, because the producer's application did not make an adequate showing that such a condition was required by the public convenience and necessity. This Court thereafter reversed solely on the ground that, once the court of appeals had determined that the Commission had authority to issue certificates limited as to time, it should have remanded the case to the Commission rather than deciding itself whether the producer was entitled to such a certificate (353 U.S. 944).

Subsequently, in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 267 F. 2d 471 (C.A. 10) (*Sunray II*), the same court held that, while the Commission has authority to issue limited-term certificates, it also has authority to issue certificates without limitation as to time, even when the producer's application seeks only a limited-term certificate permitting termination of service at the expiration of the underlying contract.

The decision of the Tenth Circuit in *Sunray II* was affirmed by this Court in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137. This Court stated (364 U.S. at 142):

> If petitioner's contentions, as to the want of authority in the Commission to grant a permanent certificate where one of limited duration has been sought for, were to be sustained, the way would be clear for every independent producer of natural gas to seek certification only for the limited period of its initial contract with the transmission company, and thus automatically be free at a future date, untrammeled by Commission regulation, to reassess whether it desired to continue serving the interstate market.

It was this sentence that the court of appeals in the present case quoted as fortification for its conclusion that the Commission lacks authority to authorize future abandonment at the time of certification. The court of appeals was correct in thinking that a permanent certificate with pre-granted abandonment is legally and functionally identical to a limited-term

certificate.[6] But it erroneously inferred from this Court's opinion in *Sunray* that a limited-term certificate would be barred by the Act.

Quite the contrary is true. This Court specifically endorsed in its *Sunray* opinion the Tenth Circuit's holding in *Sunray I* that the Commission was authorized to issue certificates limited as to time. "There is," this Court stated, "no contention that the Commission was again indulging in *the erroneous notion that it had no power to issue a limited certificate,*" citing *Sunray I* (364 U.S. at 157).

This Court's holding in *Sunray* was that the Commission *could* issue a certificate *without* a limited term, so long as it did so with recognition that the Act also permits, in a proper case, the issuance of a certificate *with* a limited term. The court of appeals in the present case mistakenly read this Court's opinion as implying that the Act *forbids* the issuance of a limited-term certificate. Thus, whereas the Tenth Circuit has squarely held, and this Court has clearly stated, that the Commission has authority, in proper circumstances, to approve the future termination of service based on public interest considerations as viewed by the Commission at the time of certification, the court of appeals in the present case held that

[6] "Pre-granted abandonment" and "limited-term certificate" are merely different descriptions of the same process. In either case, the Commission determines at the time of certification that the present or future public convenience and necessity, as perceived by the Commission at that time, warrant the issuance of a certificate that permits the future discontinuance of service under it on a date certain without need for further proceedings.

termination of service may be approved under the Act only at the time of the proposed termination and on the basis of public interest considerations as they exist at that time.

There is nothing in Section 7(b) of the Act, however, that requires the Commission to make its public interest finding at the time of the proposed abandonment. Abandonment authorization may be predicated upon "a finding by the Commission * * * that the present or future public convenience or necessity permit" it (15 U.S.C. 717f(b)). That determination can properly be made at the time of certification and can be based upon the Commission's view of the public interest under present conditions as well as under conditions that are likely to exist at the time of the proposed abandonment.[7]

The Commission is not limited by Section 7(b) to a narrow consideration of whether the gas is likely to be needed for the interstate market after the proposed termination. It can properly consider a broad range of factors, including the public need for the gas during the period *prior* to the proposed termination. As the Tenth Circuit stated in its opinion in *Sunray I*, "[i]n some cases, legal, physical, financial or other factors may be shown to exist which warrant conditioning certificates as to time" (239 F. 2d at 100).

[7] The Commission emphasized in its order denying rehearing that the mere existence of a time limit in the underlying contract will not control its decision whether to authorize, at the time of certification, a future withdrawal of service. That decision must be predicated in every case upon a finding by "the Commission that the present or future public convenience and necessity permits such abandonment" (App. E, *infra*, p. 55a).

Nor does the Commission's determination depend, as the court of appeals stated, upon "more clairvoyance than even the Commission's expertise reasonably encompasses" (App. A, *infra*, p. 21a). An application of an agency's expert judgment frequently requires some forecasting of future circumstances. That an order authorizing future abandonment may be based in part on the Commission's assessment of the conditions that may exist at the time of the proposed termination of service does not mean that the program is unreasonable. Each such determination by the Commission will be subject to judicial review on the basis of the record that was before it. That is the time to consider whether the Commission's judgment can be supported.[8]

2. The decision of the court of appeals with respect to pre-granted abandonment would, if left undisturbed, seriously hamper the Commission's efforts to alleviate the Nation's critical natural gas supply shortage. Pre-granted abandonment authority is an integral part of the optional procedure program. The Commission recognized that some producers are reluctant to sell their gas in interstate commerce for fear of making an indefinite commitment to that market. The availability of pre-granted abandonment makes it possible for the Commission to eliminate that fear, in appropriate cases and consistent with the public interest, by authorizing termination of the service on a date certain.

[8] It is thus inaccurate to state, as the court of appeals did, that "abandonment will not be subject to future review but will be completely untrammeled" (App. A, *infra*, p. 21a). It is true that there may be no agency or judicial review at the time the service is terminated. But there will be full opportunity for review at the time the termination is authorized by the Commission.

It is the Commission's judgment that the setting aside of the pre-granted abandonment provision would be likely to undermine significantly the efficacy of the optional procedure program in attracting new supplies to the interstate market.[8]

In addition, the court of appeals' decision casts doubt on the validity of another of the Commission's important programs, by which it issues limited-term certificates for short-term producer sales upon a showing that the purchasing pipeline has an emergency need for the gas (18 C.F.R. 2.70). This program has operated successfully to attract needed short-term dedications to the interstate market. The reasoning of the court of appeals in the present case, however, arguably affects the validity, not only of the pre-granted abandonment feature of the optional procedure program, but also of the identical feature of the limited-term emergency certificate program. Until the issue is finally resolved, the doubt created by the decision in this case may, in the Commission's judgment, deter new dedications of gas under the emergency certificate program as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Moreover, since the decision of the court of appeals with respect to the pre-granted abandonment issue is

[8] The Commission already has had to dismiss several optional procedure certificate applications because they were predicated upon the need for pre-granted abandonment. See, *e.g.*, *Tenneco Oil Co.*, Dkt. No. CI75-104 (October 21, 1974); *Franks Petroleum, Inc.*, Dkt. No. CI75-114 (October 21, 1974).

inconsistent with the reasoning of this Court's decision in the *Sunray* case, and because of the urgent public interest in a prompt resolution of the doubts created by the court of appeals' opinion, we believe it would be appropriate for this Court summarily to reverse the judgment of the court of appeals insofar as it set aside the pre-granted abandonment provision of Order No. 455.

Respectfully submitted.

ROBERT H. BORK,
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Federal Power Commission.

JANUARY 1975.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1837

JOHN E. MOSS, ET AL, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

MOBIL OIL CORPORATION
ASSOCIATED GAS DISTRIBUTORS
CONTINENTAL OIL COMPANY
PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK
CONSUMERS UNION OF U.S., INC., INTERVENORS

No. 72-1846

AMERICAN PUBLIC GAS ASSOCIATION
AMERICAN PUBLIC POWER ASSOCIATION
CONSUMER FEDERATION OF AMERICA, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

MOBIL OIL CORPORATION
ASSOCIATED GAS DISTRIBUTORS
CITY OF CHICAGO, INTERVENORS

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No. 72-1892

AMOCO PRODUCTION COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

CONTINENTAL OIL COMPANY
MOBIL OIL CORPORATION, INTERVENORS

Petition for Review of Orders of the Federal Power Commission

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Decided August 15, 1974

Morton L. Simons, with whom *Barbara M. Simons* was on the brief for petitioners in Nos. 72-1837 and 72-1846.

William H. Emerson for petitioner in No. 72-1892.

George W. McHenry, Jr., Acting Solicitor, Federal Power Commission, with whom *Leo E. Forquer*, General Counsel, *Michael J. Manning* and *Joan E. Heimbigner*, Attorneys, Federal Power Commission were on the brief for respondent.

Charles F. Wheatley, Jr., *William T. Miller* and *Edward Berlin* were on the brief for petitioners in No. 72-1846.

Tom P. Hamill, *Carroll L. Gilliam* and *Philip R. Ehrenkranz* were on the brief for intervenor, Mobil Oil Corporation.

Peter H. Schuck and *Marsha N. Cohen* were on the brief for intervenor, Consumers Union of United States, Inc.

Hamilton Treadway filed a brief as *amicus curiae* urging reversal.

Tom Burton entered an appearance for intervenor, Continental Oil Company.

John E. Holtzinger, Jr., entered an appearance for intervenor, Associated Gas Distributors.

Richard A. Solomon entered an appearance for intervenor, Public Service Commission for the State of New York.

Before: TAMM, MACKINNON and ROBB, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBB.

ROBB, *Circuit Judge*: The petitioners challenge a rule issued by the Federal Power Commission by Orders Nos. 455 and 455-A, pursuant to a rulemaking procedure in Commission Docket No. R-441.

I.

The notice of proposed rulemaking in Docket No. R-441 proposed to amend the Commission's General Rules of Practice and Procedure by inserting a new "Section 2.75 Optional Procedure for Certificating New Producer Sales of Natural Gas". In the notice the Commission disclaimed any intention to supersede existing area rate procedures or decisions. The notice referred to the gap between the supply of natural gas and the demand, and the damaging impact of this shortage on the environment, economic growth, and costs to consumers. The proposed amendments to the Commission's rules were then set forth in full.

The proposed new Section 2.75 provided that "applications for certification of future sales of natural gas produced within the United States may, at the option of the signatory parties to sales contracts, be submitted in accordance with the provision [sic] of this Section." The proposal set up a procedure whereby the Commission would certificate new sales of natural gas under contracts executed on or after April 6, 1972. Under this procedure applications for certification of such new sales might be tendered by parties to a contract, and would "be considered for permanent certification, either with or without pregranted abandonment, notwithstanding that the contract rate [might] be in excess of an area ceiling rate established in a prior opinion or order of this Commission." The rates thus established would not be subject to change in later proceedings, and the certification would "constitute a final determination, under Section 7 of the Natural Gas Act, that the rates and services therein specified are required by the present and future public convenience and necessity". Deliveries could commence pending review of an application by the Commission and if the Commission had not entered its final order in six months the seller could charge the contract price.

The Commission called for written comments from any interested persons, and ninety-three written submittals were received. These included comments from independent producers, interstate pipeline companies, distribution companies, state regulatory agencies, other federal agencies, United States Senators and Congressmen, and trade and consumer organizations. Our petitioners were among those who submitted comments, objecting on grounds now asserted before us.

On August 3, 1973 the Commission issued Order No. 455, entitled "Statement of Policy Relating to Optional Procedure for Certificating New Producer Sales of Natural Gas". In its Statement the Commission reviewed "data available to the Commission [that] indicates a worsening of the gap between natural gas demand and supply." "The assurance of adequate supplies of natural gas", said the Commission, "can mitigate the damage being done to the nation's environment", and "further aggravation of the gas supply problem also portends grave implications for the nation's economic objectives." In light of these considerations the Commission concluded that:

> Our responsibility to the consumers of natural gas, to assure reliable and adequate supplies at the lowest reasonable cost, impels us to that course of action best calculated to spur domestic exploration and development. To this end, we seek to provide two incentives to domestic production, both fully congruous with consumer protection. First, we will certificate sales of gas not previously deliverable to the interstate market at prices which are shown to be in the public interest. Second, to the extent possible, we will lessen rate uncertainty which has prevailed since the early 1960's.

The Commission emphasized that its policy statement and the optional procedures established were "directed at supplies of gas not available to the interstate market prior to April 6, 1972"; that "consumers will not pay higher rates except for new supplies, and then only to that extent that the contracting parties establish on the record that the price to be paid is required by the public interest." The Commission said that domestic gas exploration and development were impeded by rate uncertainty, since "there is no assurance at the present time that a producer may not ultimately have to refund some of an initial rate based on a just and reasonable determination and upon which the producer relied when it dedicated a new gas supply to the interstate market." Recognizing "the supremacy of Section 5" of the Natural Gas Act, "that Section 5 . . . prevents

the Commission from granting sanctity of contract" and that it could not "bind a future Commission not to invoke the prospective operation of Section 5" the Commission announced its "policy to examine the justness and reasonableness of proposed rates in Section 7 proceedings instituted under this Section, thus avoiding the uncertainty of reserving rate determinations for subsequent Section 4 or Section 5 action." With this preface the Commission promulgated the new Section 2.75 of its Rules of Practice and Procedure, General Policy and Interpretations. We reproduce the Rule in full in the appendix, and we shall examine in particular the provisions on which the petitioners center their attack.

On applications for rehearing and a motion for stay of its Order No. 455 the Commission on September 8, 1972 issued Order No. 455-A entitled "Order Clarifying Order, and Denying Applications for Rehearing and Stay".

In this court the petitioners, except for the petitioner Amoco Production Company, contend that the optional procedure of Section 2.75 is a method of deregulating natural gas by certifying contract rates, without regard to the standards of Sections 4 and 5 of the Act. They attack the findings of the Commission that the shortage of natural gas requires the new program and justifies its estimated costs; and they argue that they were entitled to an evidentiary hearing on this matter. They challenge the provision of the new rule that the Commission may review and by one decision at the outset approve both an initial price and fixed rate escalations provided in the sales contract for future periods. They also challenge as "contrary to the consumer-protection objectives of the Natural Gas Act" the provision of the new rule that if the Commission has not acted on an application within six months a producer may collect contract rates without liability to refund. Finally, they contend that the Natural Gas Act prohibits pregranted abandonment, which the new rule would authorize.

Amoco Production Corporation (Amoco) argues that the Commission by its Orders Nos. 455 and 455-A has established rates without an adequate record or an opportunity for hearing. In addition, Amoco challenges the requirements that producers waive contingent escalations and that indefinite pricing clauses be excluded from their contracts.

The intervenor Mobil Oil Corporation supports the Commission's orders and urges that the petitions for review be denied.[1]

II.

The Commission's order is premised on its finding of a shortage of available domestic gas reserves. Although the petitioners question this premise we cannot reject the Commission's finding. The existence of a shortage of natural gas has been recognized by the Supreme Court and by this court. *See F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621, 626 (1972); *City of Chicago v. F.P.C.*, 147 U.S. App. D.C 312, 458 F.2d 731 (1971), *cert. denied*, 405 U.S. 1074 (1972); *Public Service Commission of N.Y. v. F.P.C.*, 151 U.S. App. D.C. 307, 467 F.2d 361 (1972). As the Commission said in Order No. 455-A the petitioners' argument ignores "the curtailments of firm gas customers by seven major interstate pipelines during the 1971-1972 heating season. Twenty-

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[1] Hamilton Treadway, Esquire, filed a brief *amicus curiae* contending that the orders are invalid because (1) no hearing was held by the Commission and the orders are based on inadequate statements of fact and questionable conclusions; (2) the Commission failed to comply with the requirements of the National Environmental Policy Act, and (3) the Commission's orders are a step in the process of deregulation. We are not persuaded by these arguments.

eight pipelines have now filed curtailment plans. Firm requirement deficiencies during the 1972-1973 heating season are expected to be even more severe. In other words, new customers are being denied gas service and the service to existing customers is being reduced. The salient fact is that there is a shortage in deliverable gas reserves contrary to the national interest." [Footnote omitted.]

Since this was a rulemaking proceeding in which all interested persons were afforded an opportunity to make their views known by written comments, in accordance with Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, a formal evidentiary hearing was not necessary. *United States v. Florida East Coast Rwy. Co.*, 410 U.S. 224 (1973); *City of Chicago v. F.P.C.*, 147 U.S. App. D.C. 312, 458 F.2d 731 (1971), *cert. denied*, 405 U.S. 1074 (1972); *American Public Gas Association v. F.P.C.*, —— U.S. App. D.C. ——, —— F.2d —— (1974) No. 71-1812 (D.C. Cir. decided May 23, 1974). The Commission was entitled to act, as it did, on the data available to it and from other proceedings before the Commission, and the information furnished in the comments submitted.

III.

The petitioners contend that the Commission by its new rule has attempted to substitute contract prices negotiated between producers and pipelines for established just and reasonable rates—in other words, the petitioners say that contract rates will be automatically approved. If this were the meaning and effect of the Commission's Order it would of course be invalid, for "just and reasonable" rates may not be determined solely and conclusively upon the basis of market or contract prices. *F.P.C. v. Texaco, Inc.*, 42 U.S.L.W. 4867 (U.S. June 10, 1974); *F.P.C. v. Sunray DX Oil Co.*, 391 U.S.

9, 25 (1968). Equally true however is that the contract or market price of gas may be taken into account, along with other non-cost factors, in the setting of just and reasonable rates. Thus under both Section 4 and Section 7 of the Act the Commission properly proposed to consider economic and market conditions, the adequacy of allowances for exploration and development, and the inadequacy of the supply of natural gas. *F.P.C. v. Texaco, Inc., supra; Permian Basin Area Rate Cases*, 390 U.S. 747, 793-95 (1968); *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378, 391 (1959); *Southern La. Area Rate Cases (Austral Oil Co. v. F.P.C.)*, 428 F.2d 407, 441 (5th Cir.), *cert. denied*, 400 U.S. 950 (1970).

A respectable argument can be made that Section 2.75 on its face fails to disclose with sufficient clarity the purpose and determination of the Commission, in issuing certificates thereunder, to consider all factors—including producers' costs—relevant to the fixing of just and reasonable rates. The Rule itself is ambiguous. It fails to specify the factors the Commission will consider in deciding whether contract rates are just and reasonable, and it is open to the construction that contract rates will be certified automatically as just and reasonable. *Cf., F.P.C. v. Texaco, Inc., supra.* We think however that the rule must be interpreted in the context of the gloss placed upon it by the Commission in Orders Nos. 455 and 455-A, and when it is so interpreted we are convinced that it can be sustained.

As we have said the Commission in Order No. 455 announced its "policy to examine the justness and reasonableness of proposed rates in Section 7 proceedings instituted under this Section, thus avoiding the uncertainty of reserving rate determinations for subsequent Section 4 or Section 5 action." In its examination of proposed rates, said the Commission, "each contract filed under the alternative procedure must be considered on the merits of the terms and provisions within each con-

tract. There certainly must be some evidentiary basis proferred by the seller-applicant upon which we can judge whether the contract rate is just and reasonable. We will, absent a showing of special circumstance, accept as conclusive the cost findings embodied in our area rate decisions, as such may be supplemented from time to time by appropriate Commission order." Thus, the Commission's review will include consideration of costs; and since all applications are subject to notice, intervention and hearings, all parties are free, upon a "showing of special circumstances" to challenge the cost findings embodied in area rate decisions.

In Order No. 455-A, clarifying Order No. 455, the Commission pointed out that no rates were prescribed by Order No. 455 and asserted that "individual hearings will be held on each certificate application so filed at which time any interested party, including petitioners, may intervene and present evidence." Responding to the charge that by issuing Order No. 455 "we have deregulated natural gas producers" the Commission said:

> Contrary to the "Concerned Congressmen's" contention, this procedure is not without standards. Certification will be subject to the standards of "just and reasonable" in Section 4 and "present and future public convenience and necessity" of Section 7. We will apply those standards of the Natural Gas Act as interpreted by the courts. In other words, only after a hearing, and Commission findings, subject to Section 4 and 7, will such a certificate be granted. This is not decontrol.
>
> * * * * *
>
> Section 2.75 1 specifically states that the rates, charges and services to be certificated under the optional procedure shall be just and reasonable and required by the present and future public convenience and necessity. In other words, such certification shall conform to the standards of Sections 4 and 7 of the Natural Gas Act.

We agree with the Commission that when considered and construed in the light of these positive statements the Commission's Rule does not abandon the standards of Section 4 of the Act, and we have previously noted the Commission's recognition that Section 5(a) of the Act will remain applicable to all rates. *Atlantic Refining Co. v. Public Service Commission, (CATCO),* 360 U.S. 378, 391 (1959); *Permian Basin Area Rate Cases, supra; Austral Oil Co. v. F.P.C., supra.* What the Commission proposes is to combine proceedings under Sections 4 and 7. In the single combined proceeding, says the Commission, the substantive standards of both Sections 4 and 7, as established by the courts, will be applied to the evidence produced by the applicant. If in weighing the evidence the Commission violates those substantive standards, the aggrieved party will have a remedy in the courts. On the present record, however, we must assume that the Commission will abide by the standards of the statute and the promises it has made. We cannot condemn the Commission on the theory that it may not do what it has promised to do.

IV.

Section 2.75 provides that the Commission may review and by one decision at the outset approve both an initial price and fixed rate escalations provided in the sales contract for future periods. The petitioners contend that review of fixed price escalations during the certificate proceedings, in advance of their effective date, violates Sections 4(d) and 4(e) of the Act. 15 U.S.C. §§ 717c(d) and 717c(e) which provide in pertinent part:

> Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public.
>
> * * * * *

> Whenever any such new schedule is filed the Commission shall have authority, . . . to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, . . . may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect. . . .

In Order No. 455-A the Commission commented on its provision for advance approval of contract rate escalations.

> We have also been asked to clarify whether or not contract escalations approved by the Commission in a Section 2.75 proceeding would be self-operative or whether such would necessarily be subject to rate change filings under Section 4(e) of the Natural Gas Act. We believe that this inquiry is answered by *Episcopal Theological Seminary of the Southwest v. F.P.C.*, 269 F.2d 228 (CADC), cert. denied *sub nom., Pan American Petroleum Corp. v. F.P.C.*, 361 U.S. 895 (1959), wherein it was held that *no* rate change could become effective without a 4(e) filing. This is not to say, however, that the Commission recedes from the basic position expressed in Order No. 455 that it intends to grant sanctity of contract to the full extent that the Commission can, absent amendment of the Natural Gas Act by Congress. It is our intention to consider applications under Section 2.75 and make a one time determination of the public convenience and necessity aspects of the certificate application and the justness and reasonableness of the rates therein proposed, both as to initial rates and as to definite escalations which might be embodied in the contract. For future definite escalations to become effective without a 4(e) filing will require amendment of the Natural Gas Act, through legislation such as that now pending before Congress. [Emphasis in original.]

Thus, the seller-applicant will be required to make a change in rate filing with the Commission at the time

any escalation is scheduled to take effect. The Commission and the public will be placed on notice that the escalation is about to become effective, and the provisions of Section 4(e) will come into play. The Commission may also invoke Section 5 to investigate any rates, charges, or terms of service contained in the contract; and any rates which appear to be unreasonable may be reduced in proceedings under Section 5(a).

According to the petitioners it is impossible for the Commission, in advance, to determine the "reasonableness" of future rate escalations in Section 4 proceedings.

In area rate proceedings the Commission may impose a moratorium or ceiling, setting a just and reasonable rate that will obtain for a number of years. *Permian Basin Area Rate Cases, supra, Southern Louisiana Area Rate Cases, supra.* Such ceilings are imposed on the basis of projections of future conditions. Here, we have fixed escalations in contract rates, based upon applicants' projections of conditions over the life of a contract. The Commission will consider the escalations against its own projections and may of course modify the proposed rate increases. Section 2.75 provides a procedure for this consideration under Section 4 of the Act. Any increases initially approved remain subject to review in future proceedings under Section 4(e) and Section 5(a). We conclude that this procedure does not violate the Act.

We cannot say as an abstract proposition of law that it is impossible for the Commission to make an advance determination of "reasonableness" in proceedings under Section 4. Although as a practical matter one may be skeptical about the ability of the Commission to succeed in this endeavor, we think it may make the attempt. Whether it succeeds will depend upon the evidentiary basis for the escalations proposed in a given contract and the reasonableness of Commission findings and projections supporting and approving such escalations. The

question is one of proof which can be answered only on a record setting out a particular proposal and the evidence supporting it.

V.

The new Section 2.75 provides in paragraph (o) that upon filing an application for certification a seller may commence deliveries "at rates no higher than the prevailing area ceiling rate", and may continue such deliveries for six months unless the Commission at an earlier date enters its final order on the application. If the Commission does not issue its final order within six months the seller, upon filing a notice of change in rate, may collect the contract rate, without refund obligation, and may continue to collect the contract rate until the Commission takes final action.

The petitioners contend that (1) the Commission may not permit the contract rates to go into effect before the completion of the certificate proceedings, and (2) any rate above the area rate which is charged before it is determined to be just and reasonable must be subject to refund. We are not persuaded by the petitioners' contentions.

When Section 2.75(o) is examined in the context of the applicable provisions of the Act and the Commission's rulemaking authority under Section 16 it will be seen that the effect of the Rule is this:

(1) When an applicant files for certification of a sale at a rate above the area rate he will be granted a temporary certificate to sell at the applicable area rate, with the condition under Section 7(e) that he not file for an increase for six months, if a permanent certificate is not issued within that period;

(2) If a permanent certificate is not issued within six months the producers may file for a rate increase up to the contract rate under Section 4(d); and

(3) Upon such filing the Commission will exercise its discretion under Section 4(e) not to suspend the increase and not to order refunds if the just and reasonable rate is later determined to be lower than the contract rate. We think these procedures are within the Commission's statutory authority.

Pending the issuance of a permanent certificate the Commission under Section 7(e) of the Act may issue a temporary certificate containing such reasonable terms and conditions as the public convenience and necessity may require. *Atlantic Refining Co. v. Public Service Commission (CATCO), supra*, at 391; *F.P.C. v. Hunt*, 376 U.S. 515, 520-21 (1964). There can be no question therefore that the Commission may issue temporary authorizations to permit deliveries at area rate ceilings pending final action on applications; and the Commission is not bound to order refunds of rates collected on an interim basis under a temporary authorization issued under Section 7, even if the final order upon a certificate application contains a finding that a lower rate must be collected prospectively. *Public Service Commission of N.Y. v. F.P.C.*, 117 U.S. App. D.C. 287, 329 F.2d 242, *cert. denied*, 377 U.S. 963 (1964); *Continental Oil Co. v. F.P.C.*, 378 F.2d 510, 532 (5th Cir. 1967).

Section 4(e) provides only that refunds "may" be ordered and the Commission has discretion to find that the objectives of the Act may not require refunds. *Hugoton-Anadarko Area Rate Case*, 466 F.2d 974, 990-91 (9th Cir. 1972). Moreover, the Commission may order refunds under Section 4(e) only after suspension, *Mobile Gas Service Corp. v. F.P.C.*, 215 F.2d 883 (3rd Cir. 1954), *aff'd sub nom., United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); and refusal to suspend a filed rate is a nonreviewable exercise of the agency's discretion. *Arrow Transportation Co. v. Southern Ry.*, 372 U.S. 658 (1963); *Municipal Light*

Boards of Reading and Wakefield, Mass. v. F.P.C., 146 U.S. App. D.C. 294, 304, 450 F.2d 1341, 1351 (1971), *cert. denied*, 405 U.S. 989 (1972). Since the Commission in the exercise of its nonreviewable discretion has decided that it will not suspend the applicants' contract rates we think it must follow that it may lawfully refuse to require refunds.

VI.

Section 2.75 provides that by accepting a certificate under the optional procedure the seller-applicant unconditionally agrees to waive all rights to contingent adjustment of flowing gas rates as provided by the Commission in area rate decisions (*Southern Louisiana II* and *Texas Gulf Coast*) for flowing gas which the seller-applicant produces in the same geographical pricing area as the pricing area of the production covered by the application.

Amoco attacks the waiver requirement upon the grounds that (1) no interrelationship exists between area rate orders and applications for certification under the new procedures and (2) the differences in rate treatment create a discriminatory preference. Amoco says "The new gas incentive that is the objective of Order No. 455 will be greater in producing regions other than Southern Louisiana and the Texas Gulf Coast that are not affected by this waiver requirement. Pipeline companies and consumers of gas are affected in that some may be forced to pay higher prices for gas certificated under Order No. 455 because such prices must overcome the economic effect of waiver of contingent escalations in area rates covering gas sold to others." We think these arguments must fail.

The Commission's explanation satisfies us that the provisions of the challenged paragraph are reasonable. The Commission said:

> Our reasons for imposing the conditions [of the paragraph] . . . are two-fold: First contingent escalations are a component of area rates. Flowing and new gas prices were established in Southern Louisiana and Texas Gulf Coast with due regard to the incentives which these escalations provided. . . .
>
> Secondly, but of equal importance, we offer the procedures herein adopted as an optional procedure to function in parallel with area rate regulation. Were we to cast aside the waiver required in [the] paragraph . . ., consumers would be injured, and producers in Southern Louisiana and in Texas Gulf Coast (the only producers affected by this waiver) would be afforded an unfair position over producers in all other areas. Such unacceptable results would occur because applications under this Section would operate, in the absence of [the] paragraph . . ., not only on new gas sales but would also operate to escalate old gas prices as well.
>
> By retaining [the] paragraph . . . we require, in effect, an election by producers with flowing gas in Southern Louisiana and Texas Gulf Coast; they must choose whether contingent escalations on flowing gas provide a sufficient incentive to seek and sell new gas to the interstate market. at area rates, or whether a greater degree of market freedom in the pricing of new supplies offsets the benefit of contingent escalation of flowing gas prices. Requiring this election protects the consumer, as we must, from escalation of both flowing and new gas rates.
>
> We cannot, in equity, permit a producer with flowing gas in Southern Louisiana or Texas Gulf to achieve higher-than-area rate prices for its own new deliveries and still receive price escalations on its flowing gas through the efforts of other producers who elect to remain on area rate pricing for new dedications.

Thus, the Commission points out that the contingent escalation provisions are integral parts of the area rate orders, offering incentives to encourage producers to explore for and develop additional supplies of gas. If no

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additional supplies are developed then the contingent escalations do not become effective. The Commission's new rule provides different incentives to encourage exploration, development and immediate dedication of gas to the interstate market. The rule does not supersede the area rate orders but gives the producer a choice: he may dedicate his new gas under the procedure that is most beneficial to him. If he elects to file under the new procedure it is reasonable to provide that he may not enjoy the contingent escalations provided in the area rate orders. He may benefit under one procedure but not under both.

VII.

Section 2.75 provides that with certain exceptions contracts including any type of indefinite pricing clause will not be accepted for filing. Explaining this provision the Commission said, in Order No. 455:

> We have determined that so-called "area rate clauses" should not be allowed because area ceiling rates might then become a floor for all future contracts to be certificated under the optional procedure. Further, redetermination and renegotiation clauses will not be permitted because rates under the optional procedure would, perforce, be continually changing. Other types of clauses should be allowed, and, therefore, the following language is adopted.
>
> > No contract shall be accepted for filing if it includes any type of indefinite pricing clause except Btu price adjustment clauses, clauses to reflect changes in state production taxes, and clauses allowing for the recovery of compression and dehydration charges. Indefinite pricing clauses shall include, but are not limited to "area rate or FPC clauses", a "price redetermination or renegotiation clause" or a "special escalation clause."

Amoco argues that this prohibition is arbitrary and is an invalid repeal of Section 154.93 of the Commission's

Rules and Regulations. Section 154.93, 18 C.F.R., Subchapter E, Part 154, describes the type of price change provisions which may appear in a rate schedule to be certificated by the Commission.

We think the Commission's prohibition must be sustained.

If the new rule repeals or modifies Section 154.93 this action is a proper exercise of the Commission's authority to amend its regulations as it deems necessary and appropriate. Nor can we say that the action was arbitrary. The Commission may of course make rules prohibiting certain pricing clauses in contracts to be certificated, *Texaco v. F.P.C.*, 377 U.S. 33 (1964); and the Commission has consistently held that indefinite pricing clauses are contrary to the public interest. *See Pure Oil Co.*, 25 F.P.C. 383 (1961), *aff'd Pure Oil Co. v. F.P.C.*, 299 F.2d 370 (7th Cir. 1962).

Here the Commission is endeavoring to provide the producers with some measure of price certainty and stability. To accomplish that end the Commission offers an optional procedure under which producers may elect not to adhere to area price ceilings. It is reasonable to make the "area rate" clauses unavailable to a producer who by exercising this option elects not to adhere to the area ceilings. As the Commission explained in Order No. 455-A:

> . . . We are particularly urged to permit the inclusion of so-called "FPC clauses" or "area rate clauses" in contracts tendered for certification under Section 2.75.
>
> If we did not intend to afford sanctity of contract to the fullest extent available to this Commission, we would be inclined toward sympathy with the producers' view. However, we think it inappropriate for us to sanctify a contract in the sense of guaranteeing that the price will not go down but deny the

reciprocal sanctity that a certificated contract price will not rise.

VIII.

We come finally to the provision of the new Section 2.75(e) providing:

> Applications presented hereunder will be considered for permanent certification, either with or without pregranted abandonment, notwithstanding that the contract rate may be in excess of an area ceiling rate established in a prior opinion or order of this Commission.

The petitioners contend that this provision violates Section 7(b) of the Act, 15 U.S.C. § 717f(b) which provides:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

We think the petitioners are right.

Pregranted abandonment would leave a producer free to discontinue service to the interstate market, perhaps years after the original certification, with no contemporaneous obligation on the producer to justify withdrawal of service as consistent with the public convenience and necessity. We think Section 7(b) does not contemplate or authorize such procedure.

Attempting to justify its provision for pregranted abandonment the Commission says only, in Order No. 455-A, "Certainly, when an application for pregranted abandonment is before it for determination as to its certification, the Commission may make the necessary findings required by Section 7(b) of the Act." We find this

conclusory assertion unpersuasive. We have expressed skepticism as to the ability of the Commission to make advance determination of the reasonableness of price escalations, but we have explained that the Commission may be able to do so upon the basis of projections of conditions over the life of a contract, and subject to future proceedings under Sections 4(e) and 5(a) of the Act. It appears to us however that pregranted abandonment requires more clairvoyance than even the Commission's expertise reasonably encompasses. Furthermore, abandonment will not be subject to future review but will be completely untrammeled.

We are fortified in our conclusion by *Sunray Oil Co. v. F.P.C.*, 364 U.S. 137 (1960). In that case the Supreme Court rejected the contention that the Commission lacked authority to grant a permanent certificate when one of limited duration had been applied for. The Court said:

> If petitioner's contentions . . . were to be sustained, the way would be clear for every independent producer of natural gas to seek certification only for the limited period of its initial contract with the transmission company, and thus automatically be free at a future date, untrammeled by Commission regulation, to reassess whether it desired to continue serving the interstate market.

364 U.S. 142.

The Commission's proposal for pregranted abandonment would have the same effect as the proposition contended for in the *Sunray* case, with the same potentiality of prejudice to consumers which the Supreme Court pointed out in that case.

We conclude that Section 2.75(e) of the Commission's Rule is unlawful and must be set aside. In all other respects the Commission's orders are affirmed.

So ordered.

APPENDIX

The Commission, acting pursuant to the provisions of the Natural Gas Act, as amended, particularly Sections 4, 5, 7 and 16 thereof (52 Stat. 822, 823, 824, 825 and 830; 56 Stat. 83, 84; 61 Stat. 459; 76 Stat. 72, 15 U.S.C. 717c, 717d, 717f, and 717o) *orders*:

(A) Part 2 of the Commission's General Rules of Practice and Procedure, General Policy and Interpretations, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations is amended by adding new Section 2.75, as follows:

2.75 Optional Procedure for Certificating New Producer Sales of Natural Gas

a. Notwithstanding any other provisions in the General Rules of Practice and Procedure of the Federal Power Commission, or the Regulations Under the Natural Gas Act of the Federal Power Commission, applications for certification of future sales of natural gas produced within the United States may, at the option of the signatory parties to sales contracts, be submitted in accordance with the provisions of this Section. To the extent that any Federal Power Commission General Rules of Practice and Procedure or Regulations under the Natural Gas Act are inconsistent herewith. the the same are hereby amended to permit the optional procedure herein set forth.

b. The provisions of this Section shall be available if each of the following conditions exists:

1. A contract covering the sale of natural gas in interstate commerce has been executed for gas produced from a well or wells commenced after April 6, 1972; *or* a contract covering the sale of natural gas in interstate commerce has been excuted for gas not previously sold in interstate commerce except under the provisions of Orders 402, 418 or 431 issued May 6, and December 10, 1970; April 15, 1971, respectively.

2. All parties whose gas is to be sold under the terms and conditions of such contract, except for the royalty interest therein, must agree to the submission of the same for certification in accord with the provision of this Section.

3. The purchaser under such contract is a jurisdictional pipeline.

4. The seller under such contract establishes that he has discharged, or is prepared by plan or program to discharge, refund obligations prescribed by prior orders or opinions of this Commission. It is provided, however, that any such seller may make the showing here required without prejudice to his claim in any case now pending on judicial review that such obligations were unlawfully imposed by the Commission.

5. The gas covered by the contract offered for certification is produced from a well or wells commenced on or after April 6, 1972; or the gas offered for certification has not been previously sold in the interstate market (unless abandonment has been previously granted or a sale was made under Orders 402, 418 or 431), nor has an application been previously filed with the Commission for certification of the sale of such gas, except for an emergency sale under Orders 402, 418 or 431.

c. If all of foregoing conditions precedent exist, the parties to the contract may tender the same to the Commission and request the issuance of a certificate of public convenience and necessity to the seller for sales of natural gas thereunder. Each party to the application shall certify to his portion that all parties to the contract, except those having a royalty interest only, desire certification in accordance with the terms and provisions of this Section, that the seller expressly agrees to the waivers and elections hereinafter provided for in sub-sections m and o of this Section, and that all conditions prece-

dent as set forth in sub-section b of this Section are met.

d. A certificate of public convenience and necessity issued and accepted under this Section shall not be subject to change by determinations or orders whether heretofore made or hereafter to be made in producer or pipeline rate proceedings initiated under Section 4 of the Act, and orders issued hereunder shall not constitute establishment of an area rate; provided, however, that nothing herein shall limit the applicability of Section 5 of the Natural Gas Act. Nothing done hereunder shall be recognized by the Commission as triggering any existing contract escalation clauses.

e. Applications presented hereunder will be considered for permanent certification, either with or without pregranted abandonment, notwithstanding that the contract rate may be in excess of an area ceiling rate established in a prior opinion or order of this Commission.

f. No contract shall be accepted for filing if it includes any type of indefinite pricing clause except Btu price adjustment clauses, clauses to reflect changes in state production taxes, and clauses allowing for the recovery of compression and dehydration charges. Indefinite pricing clauses shall include, but are not limited to "area rate or FPC clauses", a "price redetermination or renegotiation clause" or a "special escalation clause."

g. A seller-applicant under this Section shall state the ground for claiming that the present or future public convenience and necessity require issuance of a certificate on the terms proposed in the application, and shall provide factual support for such claims. The application shall contain a contract summary as prescribed in Sec. 250.5 of our Regulations Under the Natural Gas Act.

h. The purchaser under a contract filed under this Section shall certify that the present or future public convenience and necessity require issuance of a certificate to the seller, and shall provide information in support of such certification with respect to the purchaser's (1) system-wide supply, (2) present and estimated 3-year peak day and average day demands, (3) present and estimated 3-year requirements of customers on its system, (4) deliverability life, (5) implementation, if any of curtailment plans, (6) emergency purchases of gas under Order 431, or 157.22 or 157.29 of these Regulations, and (7) purchases of LNG or attachment of other supplemental supplies.

i. The information required by sub-section g. and h. may be submitted by cross-reference and incorporation of information already on file with the Commission.

j. Applications requesting issuance of certificates of public convenience and necessity as authorized in this Section shall be processed in accordance with the procedural requirements, including those relating to notice, intervention and hearing, set out in Part 157 of the Commission's Regulations Under the Natural Gas Act.

k. Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a statutory hearing will be held before the Commission without further notice on all applications for certificates under this Section in which no petition to intervene in opposition is filed within the time required, if the Commission on its own review of the matter believes that a grant of a certificate is required by the public convenience and necessity. Where the Commission believes that a formal hearing is required notice of such hearing will be duly given.

l. A final order of this Commission, issuing a certificate as applied for, or issuing a conditioned certificate acceptable to the applicants, shall constitute a final determination that the rates, charges and services therein specified are just, reasonable

and required by the present and future public convenience and necessity.

m. By acceptance of a certificate issued hereunder, the seller-applicant unconditionally agrees to (1) waive all rights to seek future rate increases under Section 4 of the Natural Gas Act with respect to the contract submitted, other than price escalations, if any, as certificated by the Commission; and (2) waive all rights to contingent adjustment of flowing gas rates as provided by the Commission in area rate decisions heretofore decided, for flowing gas which the seller-applicant produces in the same geographical pricing area as the pricing area of the production covered by the application made under this Section.

n. Upon the filing of an application under this Section, deliveries pursuant to the provisions of the tendered contract may be commenced, pending review of such application by the Commission. Notice of commencement of deliveries shall be given to the Commission within ten days after deliveries first commence, and shall include all pertinent information concerning the deliveries. Any such deliveries so commenced may be terminated (1) if such contract for any reason shall terminate or be terminated prior to the issuance by the Commission of a final order upon review of such application, or (2) upon the issuance of a certificate containing conditions unacceptable to the party adversely affected. If the Commission by final order shall deny such application, or if the party or parties to the contract adversely affected shall not accept the terms and conditions prescribed by the Commission, deliveries thereunder shall be terminated. Within thirty days after termination of deliveries, the seller shall notify the Commission of such termination, and shall report the date of termination, volumes delivered, and revenues received.

o. If the parties elect to commence deliveries as set forth in subsection n., such deliveries will be made at rates no higher than the prevailing area

ceiling rate and shall so continue for six months unless the Commission has made its final orders on the application at an earlier date; at the end of such six-month period (if the Commission has not made its final order), the seller upon the filing of a notice of change in rate pursuant to Section 154.94 of the Commission's Regulations shall be entitled to receive without refund obligation and the purchaser shall be entitled to pay, the rates specified in the contract, and such contract rates shall continue as the effective rates until the Commission enters its final order on the certificate application.

(B) The amendment provided for herein shall be effective as of the date of issuance of this order.

(C) The Secretary of the Commission shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

MARY B. KIDD,
Acting Secretary.

(SEAL)

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1837 SEPTEMBER Term, 1973

John E. Moss, et al, Petitioners

v.

Federal Power Commission, Respondent

Mobil Oil Corporation
Associated Gas Distributors
Continental Oil Company
Public Service Commission for the
State of New York
Consumers Union of U.S., Inc., Intervenors

No. 72-1846
American Public Gas Association, American
Public Power Association and Consumer
Federation of America, Petitioners

v.

Federal Power Commission, Respondent

Mobil Oil Corporation
Associated Gas Distributors
City of Chicago, Intervenors

No. 72-1892
Amoco Production Company, Petitioner

v.

Federal Power Commission, Respondent

Continental Oil Company
Mobil Oil Corporation, Intervenors

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 15 1974

HUGH E. KLINE
CLERK

PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Before: TAMM, MacKINNON and ROBB, Circuit Judges

J U D G M E N T

These causes came on to be heard on a petition for review of orders of the Federal Power Commission and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that Section 2.75(e) of the Federal Power Commission's rules is set aside and in all other respects, the Commission's orders are affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
Hugh E. Kline, Clerk

By: Robert A. Bonner,
Chief Deputy Clerk

Date: August 15, 1974
Opinion for the Court filed by Circuit Judge Robb.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1837 September Term, 1973

John E. Moss, et al.,
Petitioners
v.
Federal Power Commission,
Respondent

Mobil Oil Corporation
Associated Gas Distributors
Continental Oil Company
Public Service Commission for
the State of New York
Consumers Union of U.S., Inc.,
Intervenors

No. 72-1846
American Public Gas Association,
American Public Power Association
and Consumer Federation of America
Petitioners
v.
Federal Power Commission,
Respondent

Mobil Oil Corporation
Associated Gas Distributors
City of Chicago
Intervenors

No. 72-1892
Amoco Production Company,
Petitioner
v.
Federal Power Commission
Respondent

Continental Oil Company
Mobil Oil Corporation Intervenors

Before: Tamm, MacKinnon and Robb, Circuit Judges.

O R D E R

On consideration of Intervenor's (Associated Gas Distributors) petition for rehearing, or in the alternative, motion for clarification:

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BEST COPY AVAILABLE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

-2-

No. 72-1847
72-1856
72-1892

September Term, 19-

spondent's (Federal Power Commission) petition for rehearing and
titioners' (John E. Moss, et al.) petition for rehearing, it is

ORDERED by the Court that all of the aforesaid petitions
e denied.

Per Curiam
For the Court:

Hugh E. Kline
HUGH E. KLINE
Clerk

APPENDIX D

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Pinkney Walker and Rush Moody, Jr.

OPTIONAL PROCEDURE FOR CERTIFICATING NEW PRODUCER SALES OF NATURAL GAS, DOCKET NO. R-441

ORDER NO. 455

STATEMENT OF POLICY RELATING TO OPTIONAL PROCEDURE FOR CERTIFICATING NEW PRODUCER SALES OF NATURAL GAS

(Issued August 3, 1972)*

Pursuant to the Administrative Procedure Act, 5 U.S.C. 551, *et seq.* (1967) (APA) and Sections 4, 5, 7, 8, 14, 15, and 16 of the Natural Gas Act (Act),[1] the Commission issues rules fixing the terms and conditions of an optional procedure under which it will issue permanent certificates for, and will otherwise regulate sales of natural gas subject to the Commission's jurisdiction nationwide, including, but not limited to, the Southern Louisiana, Permian Basin, Other Southwest, Hugoton-Anadarko, Texas Gulf Coast, Appalachian and Illinois Basins, Rocky Mountain areas, and all other areas. The rates embodied in certificates issued pursuant to the rules and amendments set forth herein will be firm rates, not subject to refund obligation, as will be more fully explained hereinafter.

As we state in the notice issued in this proceeding on April 6, 1972 (37 F.R. 7345, 4/13/72), data available to the Commission indicates a worsening of the gap between natural gas demand and supply.

The recent report on "National Supply and Demand 1971–1990," prepared by the Federal Power Commission's Bureau of Natural Gas (BNG) shows the level of "unsatisfied demand" for gas increasing from 3.6 trillion cubic feet in 1975 to 9.5 trillion cubic feet in 1980, 13.7 trillion cubic feet in 1985 and 17.1 trillion cubic feet in 1990.[2] Additionally, it is estimated that between 1971 and 1990, the United States will require 186.4 trillion cubic feet more gas than will be available, even after making liberal allowances for pipeline imports, liquefied natural gas imports, coal gas, Alaskan gas and reformed gas.[3]

The Future Requirements Committee (FRC) estimates that the natural gas requirements for the United States will increase from about 28.2 trillion cubic

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*Published in the Federal Register on August 11, 1972 (37 F.R. 16189). Clarified, etc. by Order No. 455-A issued September 8, 1972; see also order issued November 9, 1972 denying petition to reopen and reconsider, 48 FPC —, —.

[1] 52 Stat. 822, 823, 824, 825, 828, 829, 830; 56 Stat. 83, 84; 61 Stat. 459; 76 Stat. 72; 15 U.S.C. 717c, 717d, 717f, 717g, 717m, 717o.

[2] *National Gas Supply and Demand 1971–1990*, and Bureau of Natural Gas, Federal Power Commission, February 1972, p. 3.

[3] *Ibid.*, p. 3.

feet in 1971 to 33.9 trillion cubic feet in 1975.[4] Based on information concerning presently contracted or reasonably assured supplies, the FRC estimates that the gap between the potential demand for gas and the most likely available supply will increase from .9 trillion cubic feet in 1971 to 3.9 trillion cubic feet in 1975.[5]

The assurance of adequate supplies of natural gas can mitigate the damage being done to the nation's environment. Natural gas is the cleanest burning and least polluting of all the fossil fuels.

Any further aggravation of the gas supply problem also portends grave implications for the nation's economic objectives. Between 1947 and 1970, the nation increased its annual consumption of energy from 32.9 quadrillion Btu to 68.8 quadrillion Btu, with the share of the total being contributed by natural gas increasing from 13.8 percent in 1947 to 32.5 percent in 1970.[6] During this period, the nation's real output of goods and services more than doubled and its real income per capita increased by about one-half. It is inescapable that the continued growth and productivity of the U.S. economy requires adequate and reliable supplies of energy, including adequate and reliable supplies of natural gas.

Moreover, our efforts to hold consumer costs to the lowest reasonable level can only be eroded if the nation is forced to rely more heavily on substitute or supplemental supplies of gas than would be required if our domestic natural gas resources were developed in a timely manner. New base load supplies of substitute or supplemental gas will be available to consumers only at costs significantly higher than the prices of currently available domestic wellhead supplies.[7] The price per Btu for many primary fuels is greater than the price per Btu for natural gas. This comparison is especially unfavorable to the alternative fossil fuels when the costs of storage, handling and pollution control are included. In summary, if our domestic natural gas resources are not developed in a timely manner and consumers of natural gas are forced to satisfy a commensurately larger portion of their energy requirements by using either substitute or supplemental gas supplies, *e.g.*, imported liquefied natural gas, propane, reformed hydrocarbons, gasified coal, imported natural gas, or other fossil fuels, the net effect is higher energy costs throughout the economy, with resulting inflationary pressures. Higher prices for domestic gas, if paid for new supplies, will result in a cheaper mix of energy supplies and thus represent a better alternative.

In view of these facts, we are unwilling to leave untested the producing capacity of the United States. Our responsibility to the consumers of natural gas, to assure reliable and adequate supplies at the lowest reasonable cost, impels us to that course of action best calculated to spur domestic exploration and development. To this end, we seek to provide two incentives to domestic production, both fully congruous with consumer protection. First, we will certificate sales of gas not previously deliverable to the interstate market at prices which are shown to be in the public interest. Second, to the extent possible, we will lessen rate uncertainty which has prevailed since the early 1960's.

Studies available to the Commission indicate that vast quantities of natural gas remain undeveloped in the United States. Estimates range from 1178 trillion

[4] *Future Gas Requirements of the United States*, Future Requirements Committee, Vol. No. 4, October 1971, p. 3.

[5] *Ibid.*, p. 3.

[6] *Mineral Industry Surveys, Petroleum Statement Monthly*, Bureau of Mines, Department of Interior, December 1970, p. 37.

[7] *See, e.g., Distrigas Corp.*, Docket No. CP70-196, *et al.*, Opinion Nos. 613 and 613-A, issued March 9 and June 7, 1972, 47 FPC 752, 1465, respectively. *Columbia LNG Corp., et al.*, Docket No. CP71-68, *et al.*, Opinion No. 622, issued June 28, 1972, 47 FPC 1624.

cubic feet to 2100 trillion cubic feet. We seek accelerated development of that portion of this potential supply which is economically recoverable, for in development of domestic reserves lies the best assurance of reliable supplies at the lowest reasonable cost.

As will be stated more fully hereinafter, this policy statement and the optional procedures herein established are directed at supplies of gas not available to the interstate market prior to April 6, 1972. The rulemaking does not envisage nor authorize rate increases for gas already flowing in interstate commerce through wells drilled prior to April 6, 1972. As new supplies are found or reduced to a deliverable state for dedication to the interstate consumer market, the optional procedures here set forth will become available, but because of the limited scope of this rulemaking, consumers will not pay higher rates except for new supplies, and then only to the extent that the contracting parties establish on the record that the price to be paid is required by the public interest.

While comments were received from various persons, groups, and associations, we take particular note of those of the Departments of Commerce and Interior and the Environmental Protection Agency. The Department of Commerce suggested certain amendments to the rule as noticed, which have been adopted here, and expressed support for the proposed rulemaking to encourage gas exploration and development. The Department of the Interior likewise suggested certain modifications in the rule, many of which have been accomplished by our action here, and stated, "(t)he proposed rule-making order in Docket No. R-441 is a strong step toward providing the necessary incentive that will stimulate exploration and development of new gas supplies * * *." The Environmental Protection Agency concurred "in the FPC's efforts to try to improve the gas supply position through procedures which will allow for increased reliance on market incentives."

Ninety-three persons, groups, Commissions or associations filed comments or suggestions in response to the Notice of April 6, 1972.[8] A number of those responding to the notice raised a general question of the lawfulness of the rule as proposed. We shall discuss procedural issues first and then discuss seriatim the suggestions and comments applicable to the various provisions of the rules.

PROCEDURAL ISSUES

An understanding of the relationship between the optional certification procedure we adopt herein and area rates must be based on an appreciation of the interplay between the Section 7 certificate and Sections 4 and 5 rate provisions of the Natural Gas Act (Act). That relationship is particularly important insofar as regulation of producers' sales of natural gas in interstate commerce is concerned.

Immediately following the issuance of the Supreme Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1964), holding that sales of natural gas by producers for resale in interstate commerce are subject to the Act, the Commission initiated producer regulation by issuing Order Nos. 174 (13 FPC 1194), 174-A (13 FPC 1255), and 174-B (13 FPC 1576), requiring independent producers to file applications for certificates of public convenience and necessity, pursuant to Section 7 of the Act, and to file their contracts, under which interstate sales were being made or were proposed to be initiated, as rate schedules pursuant to Section 4 of the Act.

[8] A listing of said respondents is contained in the Appendix hereto.

The Commission attempted individual company cost-of-service rate regulation following the issuance of Order Nos. 174, 174–A and 174–B. The resultant delays and uncertainty were of such magnitude that this system of producer rate regulation was clearly not in the public interest. Before this was fully recognized, contracts were filed in the *CATCO* case [*The Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959)] providing for an initial price of 21.4 cents per Mcf.

Because of opposition to the increased initial price, the Commission first issued a certificate authorizing the sale upon the condition that the producers could charge no more than 17 cents per Mcf. Since the producers had not commenced delivery of gas, they exercised their prerogative under the Act and declined to accept a certificate conditioned to 17 cents. After rehearing, the Commission issued a certificate (17 FPC 880 (1957)) authorizing the sale at the proposed initial price of 21.4 cents per Mcf because the Commission believed it was important to make certain that the large volume of gas involved (approximately 1.3 trillion cubic feet) be obtained for the interstate market. Additionally, the Commission found that consumers would be protected because of the rate sections of the Act which would enable it to reduce the price prospectively if the 21.4-cent price should prove to be unjust and unreasonable after a hearing held under Section 5 of the Act.

The Commission's order was ultimately appealed by the New York Commission and Eastern distributor companies to the Supreme Court. The Supreme Court reversed the order, ruling that the Commission was under a duty to hold the line on prices under the certificate provisions of the Act pending the outcome of rate proceedings instituted under Sections 4 and 5 of the Act (*CATCO*, *supra*, 360 U.S. at 388–390). The Court pointed out that rate proceedings are normally quite time consuming and that the public should not have to pay the 21.4 cent rate while a just and reasonable rate was being determined.

A large number of Commission orders, which had granted certificates approving initial rates on the theory that the prices could ultimately be reduced after the completion of subsequent rate proceedings, were reversed by various United States courts of appeals.[9] After the courts' reversal of Commission orders, the Commission instituted a uniform program of conditioning producer prices in certificate proceedings so as to fix initial prices for new sales to the level of previously certificated sales. The courts consistently affirmed this rationale employed by the Commission,[10] which was a result of its refusal to consider the justness and reasonableness of the price at the time the certificate was issued.

The Commission adhered to a separation of certificate and rate issues when it embarked on area rate regulation. Sales were certificated, but conditioned so that the just and reasonable rate to be charged was not established until final judicial review of the applicable area rate decision was completed.

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[9] *United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817 (CA9–1960), *cert. denied*, 365 U.S. 881 (1961); *United Gas Improvement Co.* v. *F.P.C.*, 287 F. 2d 159 (CA10–1961); *United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 147 (CA5–1961), *cert. denied*, 366 U.S. 965 (1961); *United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 133 (CA5–1961), *cert. denied*, 368 U.S. 823 (1961); *P.S.C. of New York* v. *F.P.C.*, 287 F. 2d 146 (CADC–1960), *cert. denied*, 365 U.S. 880 (1961).

[10] *Signal Oil Co.* v. *F.P.C.*, 238 F. 2d 771 (CA3–1956), *cert. denied*, 353 U.S. 923 (1957); *P.S.C. of New York* v. *F.P.C.*, 329 F. 2d 242 (CADC–1964), *cert. denied*, 377 U.S. 963 (1964), affirming "in-line" price determinations but requiring further consideration of refund conditions; *People of State of California* v. *F.P.C.*, 353 F. 2d 16 ACAT-VTFEQ; *F.P.C.* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968).

After the Commission had issued its first area rate decision involving the Permian Basin area (Opinion No. 468, *Area Rate Proceeding*, 34 FPC 159 (1965), *aff'd*, *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968)), efforts were made by producers to obtain initial prices, pursuant to Section 7, in excess of the just and reasonable rates fixed, pursuant to Sections 4 and 5, in the area rate proceeding. The Commission held that area rates would be used to establish the level of the initial rate for new sales, and, therefore, that it would not hold a hearing under Section 7 to determine new "in-line" rates once just and reasonable rates had been established. The Commission's position was upheld in *Phillips Petroleum Co.* v. *F.P.C.*, 405 F. 2d 6 (CA10–1969), and *Hunt Oil Co.* v. *F.P.C.*, 424 F. 2d 982 (CA5–1970), even though the producers had contended that they should be permitted to introduce evidence showing that their 1968, 1969 and 1970 costs had increased so as to require a higher price than the rate level fixed on 1960 costs by the Commission in the *Permian Basin* area rate proceeding. The court said the producers were attempting in a Section 7 proceeding to make a collateral attack on the area rate proceeding, and that they should ask for a reopening of the area rate proceeding if the prices established therein were inadequate (424 F. 2d at 988).

At the present time, the Commission has completed area rate hearings in all but the Rocky Mountain area [11] and has fixed just and reasonable rates for all the major producing areas in the lower 48 States.[12] Court review is pending as to all of the recent area rate opinions [13] except Order No. 411 involving the Appalachian and Illinois Basin areas.

Because our area rate orders remain under attack, at the present time a producer, even if he is willing to sell at the rates fixed in such opinions, does not know that those rates will be affirmed on appeal. Although in the *Sunray DX* case *supra*, 391 U.S. 9, the Supreme Court held that a producer cannot be required to refund below the permanently-certificated rate, the Supreme Court was not in that case ruling on the question of whether a certificated rate, based upon an area rate invalidated through court review, would necessarily be impregnable, and the certificates so indicate. Consequently there is no assurance at the present time that a producer may not ultimately have to refund some of an initial rate based on a just and reasonable determination and upon which the

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[11] *Area Rates for the Rocky Mountain Area*, Docket No. R–425, "Notice Instituting Proposed Rulemaking and Order Prescribing Procedure", issued July 15, 1971, 46 FPC 43.

[12] In addition to the *Permian Basin* decision *supra*, the Commission has instituted a new *Permian Basin* proceeding (*Area Rate Proceeding (Permian Basin Area)*, Docket No. A'70–1, 45 FPC 192 (1971)) which is awaiting an Examiner's initial decision. In addition to the first *Southern Louisiana Area Rate Proceeding* (Opinion No. 546, *Area Rate Proceeding (Southern Louisiana Area)*, 40 FPC 530 (1968), *aff'd sub nom. Austral Oil Co. (Southern Louisiana Area Rate Cases)* v. *F.P.C.*, 428 F. 2d 407 (CA5–1970), *cert denied*, 400 U.S. 950 (1970)), the Commission has issued a second decision regarding the Southern Louisiana area (Opinion No. 598, *Area Rate Proceeding (Southern Louisiana Area)*, Docket No. AR61–2, *et al.*, issued July 16, 1971, 46 FPC 86). Area rate opinions have also been issued for four other important producing areas: Opinion No. 607, *Area Rate Proceeding (Other Southwest Area)*, Docket No. AR67–1, *et al.*, issued October 29, 1971, 46 FPC 900; Opinion No. 595, *Area Rate Proceeding (Texas Gulf Coast Area)*, Docket No. AR64–2, *et al.*, issued May 6, 1971, 45 FPC 674; Opinion No. 586, *Area Rate Proceeding (Hugoton-Anadarko Area)*, Docket No. AR64–1, *et al.*, issued September 18, 1970, 44 FPC 761; and Order No. 411, *Area Rates for the Appalachian and Illinois Basin Areas*, Docket No. R–371, issued October 2, 1970, 44 FPC 1112, and Order No. 411–A, issued October 30, 1970, 44 FPC 1334.

[13] Opinion No. 586 in Ninth Circuit No. 71–1036, Opinion No. 595 in CADC 71–1828; Opinion No. 598 in Fifth Circuit No. 71–2761; *et al.*; Opinion No. 607 in Fifth Circuit No. 72–1114, *et al.*

producer relied when it dedicated a new gas supply to the interstate market. In short, after some 18 years of producer regulation, the producer does not know how much it can lawfully charge for sales of natural gas in interstate commerce nor how much it will get if it develops and sells new gas to the interstate market. The producer knows for sure only that once it sells in interstate commerce it cannot stop deliveries.

This uncertainty has impeded domestic exploration and development. We acknowledge that Section 5 of the Natural Gas Act prevents the Commission from granting sanctity of contract, and that a degree of uncertainty will remain so long as Congress withholds action on sanctity of contract legislation. We continue to urge the necessity for sanctity of contract legislation, in the firm belief that Congressional action in this field will establish a reasonable level of prices consistent with adequate service to the consumer by encouraging development of required supplies and by avoiding uncertainty factors in producer pricing, thereby attracting capital at risk at a lower return than would otherwise prevail.

To those who have commented on our rulemaking to suggest that we exceed our authority in contemplating permanent certification of producer sales at firm rates not subject to refund or reduction in later area rate proceedings, we answer by our foregoing acknowledgment of the supremacy of Section 5 over our administrative regulations and determinations. We cannot bind a future Commission not to invoke the prospective operation of Section 5, nor do we attempt to do so. We do, however, announce our policy to examine the justness and reasonableness of proposed rates in Section 7 proceedings instituted under this Section, thus avoiding the uncertainty of reserving rate determinations for subsequent Section 4 or Section 5 action. To the extent that this Commission can grant certainty of rates, we do so. Congressional enactment of sanctity of contract legislation is essential to assure that contracts dedicating new supplies to interstate markets will not be abrogated by future commissions.

Since mid-1969, the Commission has attempted in several ways to obtain new supplies of gas for the interstate market. One was the announcement in Paragraph 12 of its Statement of Policy in Docket No. R-389-A issued July 17, 1970, 35 Fed. Reg. 11638, of its willingness to consider applications proposing to make sales at initial prices above area rate ceilings. Relatively few filings have been made under Paragraph 12, because certificates thereunder are conditioned to later area rate determinations and are therefore subject to the same uncertainties as have impeded domestic development in the past.

Another of our efforts to alleviate the gas shortage was the authorization for emergency purchases. Among other features, this program involved experimentation with the use of an expedited certification procedure which encompassed a determination of a lawful rate. In proceedings under Order No. 402 (May 6, 1970, 43 FPC 707), 418 (December 10, 1970, 44 FPC 1574) and 431 (April 15, 1971, 45 FPC 570), all certification and rate issues are determined in one proceeding. Since the effective date of Order No. 431, we have issued 62 certificates at prices ranging from 26¢ to 40¢/Mcf. Approximately 500 Bcf of gas have been brought to the interstate market through this procedure. Neither the Order No. 431 procedure itself, nor any certificate issued under it has been the subject of legal attack, and we have been able to act upon certificate applications by final order issued, on the average, less than two months after the application was filed. The results of our experiment strongly indicate that producer rate regulation can be efficiently managed, in the public interest, by reaching certificate and rate issues in one proceeding, particularly if we use the abbreviated hearing process open to us under our statutes and rules.

The disadvantages to the Order No. 431 sales which have been made under the foregoing emergency regulations are two: First, on the whole no long-term dedications of reserves to pipeline companies have resulted from such sales. While the temporary sales have been of value in reducing pipeline and distributor curtailments in deliveries which otherwise would have resulted, the fact remains that the gas reserve life indices of the interstate pipeline have continued to decline. Second, Order No. 431 procedures are available only if the pipeline purchaser is in an emergency gas shortage situation.

These two disadvantages make Order No. 431 procedures an incomplete answer to the gas supply problem. Long-term dedications are essential to reliability and continuity of supply, and to pipeline financing. And secondly, we seek to prevent emergency conditions from developing, rather than responding after an emergency develops.

It should be made clear that the optional procedure is not intended to supersede the procedures currently being followed in the area rate proceedings. The area rate opinions have established rate levels for new and flowing gas sales that are currently being made, and parties may continue to operate under these procedures. This is an alternate procedure which is available if the producer is willing to forego certain benefits of area rate proceedings, in exchange for certainty of its certificated price, as determined at the certificate stage.

As the Supreme Court pointed out in *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. at 602, 64 S. Ct. at 288, and in *F.P.C.* v. *Natural Gas Pipeline Co.*, 315 U.S. 575 at 586 (1942), the Commission must make "pragmatic adjustments" in rate procedures to stimulate the discovery and dedication of gas supplies to the interstate market.

By the procedures adopted herein, the Commission now seeks to stimulate the immediate introduction of new, long-term gas supplies into the interstate market by such a pragmatic adjustment. Thus it is proceeding under its certificate authority under Section 7 of the Act. It is unquestioned that the Commission is authorized to vary the initial terms and conditions of a contract for the sale of natural gas in interstate commerce by Section 7 of the Act. Section 7(e) of the Act authorizes the Commission "to attach to the issuance of the certificate * * * such reasonable terms and conditions as the public convenience and necessity may require." In *CATCO* (*supra*) the Supreme Court held that the "Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5." *Id.* at 390-1. However, neither the Act, or any decision, prohibits consideration of whether the rate is just and reasonable.

In determining the terms and conditions under which it will issue certificates under Section 7, the Commission need not fix such terms and conditions in each proceeding, but may promulgate those of a general nature under its rulemaking authority. The Commission's rulemaking authority emanates from Section 16 of the Act, 15 U.S.C. § 717o, which states in pertinent part that:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. * * *[14]

[14] This section of the Act has been broadly construed by the Courts. *Mesa Petroleum Co.* v. *F.P.C.*, 441 F. 2d 182 (CA5-1971). In *Mesa*, the Fifth Circuit stated the Commission's agency discretion is at its zenith when enforcing its regulatory authority. *Id.* at 187. Compare *Niagara Mohawk Power Corp.* v. *F.P.C.*, 379 F. 2d 153 (CADC-1967). See also *F.P.C.* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 150-5 (1962); *Superior Oil Co.* v. *F.P.C.*, 322 F. 2d 601, 610 (CA9-1963), certiorari denied, 377 U.S. 922 (1964), rehearing denied, 377 U.S. 960 (1964).

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The Supreme Court has explicitly held "that the statutory requirement for a hearing under § 7 does not preclude the Commission from particularizing statutory standards through the rule-making process • • •." *F.P.C.* v. *Texaco Inc.*, 377 U.S. 33, 39 (1964). The Court held that the Commission may properly conclude that protection of the consumer interests will be best achieved if done at the threshold of certification, citing legislative history which is particularly pertinent to the Commission's purpose in promulgating an optional procedure herein:

> • • • The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial set-up, *the adequacy of the gas reserves*, the feasibility and adequacy of the proposed services, *and the characteristics of the rate structure* in connection with the proposed construction or extension *at a time when such vital matters can readily be modified as the public interest may demand* • • • [Emphasis supplied] (H.R. Rep. No. 1290, 77th Cong., 1st Sess., pp. 2–3, and see S. Rep. No. 948, 77th Cong., 2nd. Sess., pp. 1–2).

Recently, the United States Court of Appeals for the District of Columbia Circuit stated that "many of the same regulatory objectives which can be attained through *ad hoc* proceedings under Sections 4, 5 and 7 can also be attained through the issuance of general rules under Section 16." *City of Chicago* v. *F.P.C.*, 458 F. 2d 731, 743 (CADC–1971), cert. denied, 405 U.S. 1074 (1972).

In affirming *Permian* (*supra*) the Supreme Court noted (390 U.S. at 772):

> The Commission quite reasonably believed that the terms of any exceptional relief should be developed as its experience with area regulation lengthens. Moreover, area regulation of producer prices is avowedly still experimental in its terms and uncertain in its ultimate consequence; it is entirely possible that the Commission may later find that its area rate structure for the Permian Basin requires significant modification. We cannot now hold that, in these circumstances, the Commission's broad guarantees of special relief were inadequate or excessively imprecise. (Footnotes omitted.)

The express purpose of this rulemaking is to provide an alternate procedural framework for producer rate regulation which will stimulate and accelerate domestic exploration and development of natural gas reserves. That some modification is necessary and required under the present circumstance of a serious shortage of natural gas can no longer be denied. *Public Service Commission of the State of New York* v. *F.P.C.*, 467 F. 2d 361 (CADC–1972); *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, 456 F. 2d 326 (CA5–1972); *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 622 (1972); *Southern Louisiana Area Rate Cases* (*Austral Oil Co.* v. *F.P.C.*) 428 F. 2d 407 (CA5–1970); *Hunt Oil Co.* v. *F.P.C.*, *supra*.

Of particular significance to the instant proceedings is the District of Columbia Circuit's recent opinion in *Public Service Commission for the State of New York* v. *F.P.C.*, *supra*. In approving the Commission's rule, that a pipeline's advance payments to producers for gas to be delivered at a future date may be included in the pipeline's rate base, the Court stated (*supra* at 367):

> It appears to us that what the FPC is attempting to do in this area is to reach an accommodation of conflicting interests, through experimentation, that will result in proper alleviation of the gas shortage. In doing so we think that the FPC is making policy decisions of the type it was created to make, and we are reluctant to disturb them. In this very difficult area of rate-making, when it is uncertain what will be the ultimate agency determination, and when it is as yet unknown what will be the results

> and ramifications of the experimental policies adopted by the agency, we feel that the FPC has demonstrated, as adequately as can be expected under the circumstances, the basis for its actions, and we may thus defer to the expertise of the FPC in this matter. (Footnotes omitted).

Finally, as the Supreme Court said in *Permian* (390 U.S., at 790)

> We must reiterate that the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.

Our action in establishing a procedural framework for Commission action in the field of certificate and rate regulation is taken under our general power of rulemaking as bestowed by § 553 of the Administrative Procedure Act and Section 16 of the Natural Gas Act. Our general statement of policy, and rules of agency procedure and practice here adopted, are not subject to requirements of notice and hearing. § 553(b). In recognition of the significance of the matters here dealt with, however, we sought public comment, thereby providing a hearing, within the meaning of § 553(c) of the Administrative Procedure Act.

Certain comments filed in opposition to this rulemaking suggest that the Commission is abdicating its ratemaking responsibility by permitting producers and purchasers to set rates by private bargain. Such is not the case. Our actions in individual proceedings arising under these new procedures will answer this objection. We will be, as we should be, judged on the proper discharge of our duties on the record made before us in each case.

We are firm in our conviction that we must act in an attempt to alleviate the nation's shortage of natural gas supply, and we believe our action herein to be a reasonable and appropriate measure toward that end. We are mindful that any rate or rates we may find proper under the alternative method of certification we provide for herein will be binding subject only to subsequent findings and determinations that may be made under Section 5(a) of the Act, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 344. Contracts approved unconditionally pursuant to the alternative procedure will be free from any later attempt to impose a refund obligation. We believe that such an assurance is an alternative that must be made available, subject to the conditions we attach thereto.

ANALYSIS OF RULE

As we stated in the Notice, issued April 6, 1972, the rule we adopt hereby will not supersede the procedures that have been promulgated in our various rate opinions and orders nor supplant the procedures set forth in Docket Nos. R–389 and R–389–A, but will supplement the procedures set forth in Order No. 431, Docket No. R–418, issued April 21, 1971.

Further, the optional procedure will not affect any certificate proceeding which has been completed or is now pending under procedures set forth in the various rate opinions and orders, or under Order Nos. 402, 402–A (43 FPC 822), 431 or our Regulations 157.22 and 157.29.

COMMENTS AND SUGGESTIONS

We shall not attempt to enumerate or discuss each comment received or suggestion made about the proposed new Section 2.75 of the Commission's General Policy and Interpretations, but shall set forth the comments generally, and our conclusions as to them. Our discussion of the lawfulness of our action herein

dispenses with any need of discussing the comments made in regard to paragraph "a" of the new Section 2.75.

Paragraph 10.b.(1)—The question asked here concerned clarification as to whether acreage dedicated to an existing contract under an amendment dated on or after April 6, 1972, would be eligible for certification under the optional procedure. Because of the questions asked, it has become apparent that there is some misunderstanding of our intent to apply the optional procedure to supplies of gas not available to the interstate market prior to April 6, 1972. We seek new supplies of gas, whether such new supplies come from new acreage dedications, or from newly drilled wells, or by diversion from other uses. Accordingly, we clarify paragraph 10.b.(1) to make it read:

> A contract covering the sale of natural gas in interstate commerce has been executed for gas produced from a well or wells commenced after April 6, 1972; *or* a contract covering the sale of natural gas in interstate commerce has been executed for gas not previously sold in interstate commerce except under the provisions of Orders 402, 418 or 431 issued May 6, and December 10, 1970; April 15, 1971, respectively.

This modification will encourage full development of acreage previously dedicated to the interstate market, as well as encouraging exploration for new reserves. We conclude that expansion of incentives to include all wells commenced after April 6, 1972, the date of our original notice, will greatly encourage additional drilling; to the extent that we bring about additional drilling and production we are securing for the consumer reliable gas supplies not previously deliverable.

In recognizing that prior Commission procedures and policies, which defined the dichotomy between "new" gas and "old" gas on the basis of contract date, have failed to achieve full development of dedicated acreage, we do not intend, nor shall this statement be construed as a release of any dedicated acreage from commitment to the interstate market. Applications tendered under this Section covering gas produced from new wells on old acreage shall be treated as an application for certificate amendment and a Section 4 rate increase filing.

Paragraph 10.b.(2)—The comments received requested clarification of the term "All Parties." Some requested that "Signatory parties" be substituted for the words "all parties." However, to limit the obligation to parties who sign the sales contract would establish a loophole where working interest owners by merely declining to sign the sales contract, under which their gas is sold, would be able to obtain all the advantages of the optional procedure for the particular sale without giving up any of the advantages the area rate ceiling would afford them under their existing contracts.

Therefore, we shall not restrict the requirement that all parties to the contract, except for parties sharing a royalty interest only, agree. The following revised paragraph shall be adopted:

> All parties whose gas is to be sold under the terms and conditions of such contract, except for the royalty interest therein, must agree to the submission of the same for certification in accord with the provision of this Section.

Paragraph 10.b.(3)—In regard to this provision, all of the comments received opposed the 12-year deliverability life requirement because it is alleged the requirement is too burdensome and unnecessary. We agree that the 12-year deliverability requirement should be deleted and shall adopt the following language:

> The purchaser under such contract is a jurisdictional pipeline.

Paragraph 10.b.(4)—Of the comments received pertaining to this paragraph, the majority requested clarification of the phrase "all obligations." We believe clarification is necessary, and we shall adopt the following language:

> The seller under such contract establishes that he has discharged, or is prepared by an acceptable plan or program to discharge, refund obligations prescribed by prior orders or opinions of this Commission. It is provided, however, that any such seller may make the showing here required without prejudice to his claim in any case now pending on judicial review that such obligations were unlawfully imposed by the Commission.

Some of the respondents asked if the optional procedure is available to affiliate or subsidiary off-system and on-system sales. We have no intent to exclude such sales. However, we should point out that such sales will be examined by the Commission to assure that the proposed rates are reasonable and in the public interest.

Some question was raised as to whether small producers are eligible for certification under the optional procedure? Here again we had no intent to exclude small producers and we see no reason so to do.

Paragraph 10.b.(5)—The major problem the parties raised with this paragraph is that clarification is necessary. We agree. The following language will, we believe, clarify the paragraph and remain consistent with our amended wording of paragraph 10.b.(1).

> The gas covered by the contract offered for certification is produced from a well or wells commenced on or after April 6, 1972; or the gas offered for certification has not been previously sold in the interstate market (unless abandonment has been previously granted or a sale was made under Orders 402, 418 or 431), nor has an application been previously filed with the Commission for certification of the sale of such gas, except for an emergency sale under Orders 402, 418 or 431.

Other questions were raised in regard to paragraph 10.b. First, will the reserves dedicated under the optional procedure count toward discharge of refund obligations under area rate opinions providing for the same? The answer to that question is no. Provisions for the discharge of refund obligations are components of area rate decisions which are still pending on appeal.

Second, would gas flowing under warranty contracts qualify hereunder? The succinct answer here is: No. Opening the optional procedure to warranty gas would necessarily involve the Commission in modification of the terms of the warranty.

Paragraph 10.c—Two basic points were raised in reference to this paragraph. First, how can the seller certify to conditions relating to the purchaser? The answer is that the seller does not have to certify to any conditions relating to the purchaser. Such certification is the sole responsibility of the purchaser.

Second, replies requested clarification of the term "all parties" in the second sentence. The words "all parties" in the second sentence will be qualified by the inclusion of the phrase "except those having a royalty interest only", to conform with the change heretofore noted in paragraph 10.b.(2). Additionally to assist in the clarification of the first question, the following language for the second sentence will be adopted.

> • • • *Each party* to the application shall certify to his portion that all parties to the contract desire certification • • •

Paragraph 10.d—The parties asked here (a) if individual company rate cases, all Commission actions, and orders be included under this provision; and (b)

would rates established under the optional procedure be recognized by the Commission as a basis for triggering price escalation clauses?

In answer to the above questions, and to clarify the provision, we shall adopt the following language:

> A certificate of public convenience and necessity issued and accepted under this Section shall not be subject to change by determinations or orders whether heretofore made or hereafter to be made in producer or pipeline rate proceedings initiated under Section 4 of the Act, and orders issued hereunder shall not constitute establishment of an area rate; provided, however, that nothing herein shall limit the applicability of Section 5 of the Natural Gas Act. Nothing done hereunder shall be recognized by the Commission as triggering any existing contract escalation clauses.

Paragraph 10.e.—The only major substantive question raised by the parties here was whether short-term contracts would be accepted under this rulemaking. We see no reason to provide that only long-term contracts should be permitted under the optional procedure.

Paragraph 10.f.—Many comments were received relating to this paragraph requesting clarification of the phrase: "indefinite pricing clauses." Many specifically asked if area rate, Btu, tax reimbursement, compression and dehydration, and redetermination and renegotiation clauses would be allowed.

We have determined that so-called "area rate clauses" should not be allowed because area ceiling rates might then become a floor for all future contracts to be certificated under the optional procedure. Further, redetermination and renegotiation clauses will not be permitted because rates under the optional procedure would, perforce, be continually changing. Other types of clauses should be allowed, and, therefore, the following language is adopted.

> No contract shall be accepted for filing if it includes any type of indefinite pricing clause except Btu price adjustment clauses, clauses to reflect changes in State production taxes, and clauses allowing for the recovery of compression and dehydration charges. Indefinite pricing clauses shall include, but are not limited to "area rate or FPC clauses", a "price redetermination or renegotiation clause" or a "special escalation clause."

Paragraph 10.g.—Certain comments were based on a request that some clarification of the type and nature of factual support was necessary in light of paragraph 2 through 7 of the rulemaking procedure.

We believe that each contract filed under the alternative procedure must be considered on the merits of the terms and provisions within each contract. There certainly must be some evidentiary basis proferred by the seller-applicant upon which we can judge whether the contract rate is just and reasonable. We will, absent a showing of special circumstance, accept as conclusive the cost findings embodied in our area rate decisions, as such may be supplemented from time to time by appropriate Commission order.

Paragraph 10.h.—Most of the comments in regard to this section were made as if Paragraph 10.i. were not proposed. We believe that most of the objections would not have occurred if Paragraph 10.i. had been read closely. However, even if the information required in this paragraph is not on file with the Commission so that it may be submitted by incorporation, we believe the data will be necessary to properly judge the merits of the contract, and to make a determination of the propriety of the contract rate. Therefore, we shall make no change in this paragraph.

Paragraph 10.k.—One party filed a comment stating that the standards were not spelled out as to when the Commission would hold a formal hearing. It

is impossible at this time to set such specific standards, or to foresee when possible circumstances surrounding future filings may require a formal hearing. Therefore no change in this provision will be made.

Paragraph 10.l.—One comment was filed in regard to this paragraph asking whether filing under the alternative procedure imputs any implied waiver by the applicants thereunder. Where the waiver of any right may be provided for herein, it is an express waiver. To eliminate any doubt in the rule itself, however, we shall amend this provision to read:

> 1. A final order of this Commission, issuing a certificate as applied for, or issuing a conditioned certificate acceptable to the applicants, shall constitute a final determination that the rates, charges and services therein specified are just, reasonable and required by the present and future public convenience and necessity.

Paragraph 10.m.(2)—Virtually all the comments received on this waiver of contingent escalations were firmly opposed and sought elimination of this condition. We are impelled to retain this requirement, with one modification. We strike the phrase "or hereafter issued", thus limiting the waiver to contingent escalations provided for in Opinions 595 (*Texas Gulf Coast*) and 598 (*Southern Louisiana*). Thus, only producers with flowing gas production in Southern Louisiana or Texas Gulf are affected by paragraph 10.m.(2).

Our reasons for imposing the conditions are two-fold: First, contingent escalations are a component of area rates. Flowing and new gas prices were established in Southern Louisiana and Texas Gulf Coast with due regard to the incentives which these escalations provided. Both Southern Louisiana and Texas Gulf Coast (our only opinions which establish contingent escalations) are on appeal.

Secondly, but of equal importance, we offer the procedures herein adopted as an optional procedure to function in parallel with area rate regulation. Were we to cast aside the waiver required in paragraph 10.m.(2), consumers would be injured, and producers in Southern Louisiana and in Texas Gulf Coast (the only producers affected by this waiver) would be afforded an unfair position over producers in all other areas. Such unacceptable results would occur because applications under this Section would operate, in the absence of paragraph 10.m.(2), not only on new gas sales but would also operate to escalate old gas prices as well.

By retaining paragraph 10.m.(2) we require, in effect, an election by producers with flowing gas in Southern Louisiana and Texas Gulf Coast; they must choose whether contingent escalations on flowing gas provide a sufficient incentive to seek and sell new gas to the interstate market, at area rates, or whether a greater degree of market freedom in the pricing of new supplies offsets the benefit of contingent escalation of flowing gas prices. Requiring this election protects the consumer, as we must, from escalation of both flowing and new gas rates.

We cannot, in equity, permit a producer with flowing gas in Southern Louisiana or Texas Gulf to achieve higher-than-area rate prices for its own new deliveries and still receive price escalations on its flowing gas through the efforts of other producers who elect to remain on area rate pricing for new dedications.

The election here required is to be made on a company-by-company basis, with each company's decision to waive Southern Louisiana or Texas Gulf contingent escalations evidenced by the company's acceptance of its first permanent certificate issued under Section 2.75.

We emphasize that paragraph 10.m.(2) operates on an area-by-area basis. For example, a producer with flowing gas in Southern Louisiana can use the optional

procedures for new gas from any other area without waiving his Southern Louisiana contingent escalations. Accordingly, while we recognize that paragraph 10.m.(2) may impose a restraint on some producers, under some circumstances, the restraint is necessary and, we believe, required by the public interest.

Reserves dedicated hereunder will be allowed to count toward the contingent escalation of flowing gas rates of all other producers operating in the area, if such reserves otherwise qualify for escalation credit under the express terms of Opinions 595 and 598. This is because escalation of flowing gas rates are an industry endeavor in each area where contingent escalations are provided for and is not the function of the discharge of an obligation of any one particular company.

We emphasize also that with the exception of the one-time election required by paragraph 10.m.(2), the option between area rate pricing and certification under Section 2.75 procedures here provided lies with the producers on a contract-by-contract basis.

Paragraph 10.n.—The comments received regarding this paragraph concerned the apparent inconsistency regarding notice to the Commission provided for in the first two sentences. The comments are well-taken. The words: "after notice to the Commission" will be stricken from the first sentence, and the second sentence will be changed to read:

> Notice of commencement of deliveries shall be given to the Commission within ten days after deliveries first commence, and shall include all pertinent information concerning the deliveries.

Paragraph 10.o.—Many comments filed in regard to this provision objected to the area ceiling rate limitation for the period of six months after deliveries are commenced in accordance with Paragraph 10.n. Such a limitation is, however, a reasonable one, since predicated on the assumption that the Commission will have acted by final order within that period of time. The parties may, after the six-month period and upon the filing of a notice of change in rate by the seller, continue the service at the rates specified in the contract, without refund obligation. Six months is clearly an adequate period for preliminary Staff analysis and review of applications tendered under the optional procedure. Accordingly, by action to deny or condition certificates prior to the expiration of the six-month period, we can protect against the impact of a nonrefundable rate which is not just and reasonable. To clarify that which has appeared to concern many of those responding to this provision, we shall provide that it will be changed to read:

> • • • (If the Commission has not made its final order), the seller upon the filing of a notice of change in rate pursuant to Section 154.94 of the Commission's Regulations shall be entitled to receive without refund obligation and the purchaser shall be entitled to pay, the rates specified in the contract • • •

Paragraph 11.—A comment was received suggesting that in view of the Commission's intent, stated in the last sentence of the paragraph, to encourage long term, large volume dedications of new supplies of natural gas, the Commission should not accept contracts for less than a minimum term of twenty years. Although it is true that the desired goal of the optional procedure is to obtain long term commitments of gas, we do not believe that contracts for less than twenty years, or life of lease contracts, should be barred. Our consideration of individual applications will reflect due concern for the desirability of long-term dedications.

GENERAL COMMENTS

As we have noted above (first full paragraph, p. 219, *supra*) natural gas is the cleanest burning, and insofar as is known today, the least polluting of all the fossil fuels. This, of course, is one of the reasons for its present enlarged

demand and desirability as a fuel. Indeed, in some of our metropolitan area, "clean-air" regulations and restrictions have made natural gas not only desirable, but almost a necessity for some commercial and industrial users. The Environmental Protection Agency (EPA) filed its response in this proceeding, stating that in its opinion the optional procedure we provide for herein will be a major step toward elimination of the gas shortage and the nation's air pollution problem through the addition of new gas reserves.

These rules herein adopted are inherently procedural, providing an operational method by which to obtain certification; accordingly, our rulemaking involves no direct impact an the environment (such as construction of facilities would) nor does it indirectly affect the environment through the setting of rates. Questions of environmental concern may be proper at the time of certification, whatever the procedure employed for such certification, but such questions are of no relevance to the establishment of procedural rules.

EPA suggests that the pipelines obtaining these additional gas reserves should file volumetric information on the specific end uses to which the gas will be put. This information would be used to insure that the gas would be used to reduce air pollution. EPA recognizes the possibility that it may become necessary for this Commission to allocate the end use of gas and suggests that the data it proposes could be useful to the Commission in such a program. However, most, if not all the gas obtained through the optional procedure will go to supplying existing customers. At this time, we do not foresee the new and expanded services envisioned by EPA.

The Commission further finds:

(1) The notice and opportunity to participate in this proceeding with respect to the matters presently before the Commission through the submission, in writing, of data, views, comments and suggestions in the manner as described above are consistent and in accordance with all procedural requirements therefor as prescribed in Section 553, Title 5 of the United States Code. Since the amendment prescribed here does not prescribe an added duty or restriction, compliance with the effective date requirements of 5 U.S.C. 553(d) is unnecessary.

(2) The amendment of Part 2, General Rules of Practice and Procedure, General Policy and Interpretations, Subchapter A, Chapter 1, Title 18 of the Code of Federal Regulations, Section 2.75 Optional Procedure for Certificating New Producer Sales of Natural Gas, as herein prescribed, is necessary and appropriate for the administration of the Natural Gas Act.

(3) Since the modifications to the amendments prescribed herein which were not included in the notice of this proceeding are of a minor nature, and are consistent with the prime purpose of the proposed rulemaking herein, further notice thereof is unnecessary.

The Commission, acting pursuant to the provisions of the Natural Gas Act, as amended, particularly Sections 4, 5, 7 and 16 thereof (52 Stat. 822, 823, 824, 825 and 830; 56 Stat. 83, 84; 61 Stat. 459; 76 Stat. 72, 15 U.S.C. 717c, 717d, 717f, and 717o) *orders:*

(A) Part 2 of the Commission's General Rules of Practice and Procedure, General Policy and Interpretations, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations is amended by adding new Section 2.75, as follows:

2.75 Optional Procedure for Certificating New Producer Sales of Natural Gas

a. Notwithstanding any other provisions in the General Rules of Practice and Procedure of the Federal Power Commission, or the Regulations under the Natural Gas Act of the Federal Power Commission, applications for certification of

future sales of natural gas produced within the United States may, at the option of the signatory parties to sales contracts, be submitted in accordance with the provisions of this Section. To the extent that any Federal Power Commission General Rules of Practice and Procedure or Regulations under the Natural Gas Act are inconsistent herewith, the same are hereby amended to permit the optional procedure herein set forth.

b. The provisions of this Section shall be available if each of the following conditions exists:

1. A contract covering the sale of natural gas in interstate commerce has been executed for gas produced from a well or wells commenced after April 6, 1972; *or* a contract covering the sale of natural gas in interstate commerce has been executed for gas not previously sold in interstate commerce except under the provisions of Orders 402, 418 or 431 issued May 6, and December 10, 1970; April 15, 1971, respectively.

2. All parties whose gas is to be sold under the terms and conditions of such contract, except for the royalty interest therein, must agree to the submission of the same for certification in accord with the provision of this Section.

3. The purchaser under such contract is a jurisdictional pipeline.

4. The seller under such contract establishes that he has discharged, or is prepared by plan or program to discharge, refund obligations prescribed by prior orders or opinions of this Commission. It is provided, however, that any such seller may make the showing here required without prejudice to his claim in any case now pending on judicial review that such obligations were unlawfully imposed by the Commission.

5. The gas covered by the contract offered for certification is produced from a well or wells commenced on or after April 6, 1972; or the gas offered for certification has not been previously sold in the interstate market (unless abandonment has been previously granted or a sale was made under Orders 402, 418 or 431), nor has an application been previously filed with the Commission for certification of the sale of such gas, except for an emergency sale under Orders 402, 418 or 431.

c. If all of foregoing conditions precedent exists, the parties to the contract may tender the same to the Commission and request the issuance of a certificate of public convenience and necessity to the seller for sales of natural gas thereunder. Each party to the application shall certify to his portion that all parties to the contract, except those having a royalty interest only, desire certification in accordance with the terms and provisions of this Section, that the seller expressly agrees to the waivers and elections hereinafter provided for in sub-sections m and o of this Section, and that all conditions precedent as set forth in sub-section b of this Section are met.

d. A certificate of public convenience and necessity issued and accepted under this Section shall not be subject to change by determinations or orders whether heretofore made or hereafter to be made in producer or pipeline rate proceedings initiated under Section 4 of the Act, and orders issued hereunder shall not constitute establishment of an area rate; provided, however, that nothing herein shall limit the applicability of Section 5 of the Natural Gas Act. Nothing done hereunder shall be recognized by the Commission as triggering any existing contract escalation clauses.

e. Applications presented hereunder will be considered for permanent certification, either with or without pregranted abandonment, notwithstanding that the contract rate may be in excess of an area ceiling rate established in a prior opinion or order of this Commission.

f. No contract shall be accepted for filing if it includes any type of indefinite pricing clause except Btu price adjustment clauses, clauses to reflect changes in state production taxes, and clauses allowing for the recovery of compression and dehydration charges. Indefinite pricing clauses shall include, but are not limited to "area rate or FPC clauses", a "price redetermination or renegotiation clause" or a "special escalation clause."

g. A seller-applicant under this Section shall state the ground for claiming that the present or future public convenience and necessity require issuance of a certificate on the terms proposed in the application, and shall provide factual support for such claims. The application shall contain a contract summary as prescribed in Sec. 250.5 of our Regulations under the Natural Gas Act.

h. The purchaser under a contract filed under this Section shall certify that the present or future public convenience and necessity require issuance of a certificate to the seller, and shall provide information in support of such certification with respect to the purchaser's (1) system-wide supply, (2) present and estimated 3-year peak day and average day demands, (3) present and estimated 3-year requirements of customers on its system, (4) deliverability life, (5) implementation, if any of curtailment plans, (6) emergency purchases of gas under Order No. 431, or 157.22 or 157.29 of these Regulations, and (7) purchases of LNG or attachment of other supplemental supplies.

i. The information required by sub-sections g. and h. may be submitted by cross-reference and incorporation of information already on file with the Commission.

j. Applications requesting issuance of certificates of public convenience and necessity as authorized in this Section shall be processed in accordance with the procedural requirements, including those relating to notice, intervention and hearing, set out in Part 157 of the Commission's Regulations under the Natural Gas Act.

k. Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a statutory hearing will be held before the Commission without further notice on all applications for certificates under this Section in which no petition to intervene in opposition is filed within the time required, if the Commission on its own review of the matter believes that a grant of a certificate is required by the public convenience and necessity. Where the Commission believes that a formal hearing is required notice of such hearing will be duly given.

l. A final order of this Commission, issuing a certificate as applied for, or issuing a conditioned certificate acceptable to the applicants, shall constitute a final determination that the rates, charges and services therein specified are just, reasonable and required by the present and future public convenience and necessity.

m. By acceptance of a certificate issued hereunder, the seller-applicant unconditionally agrees to (1) waive all rights to seek future rate increases under Section 4 of the Natural Gas Act with respect to the contract submitted, other than price escalations, if any, as certificated by the Commission; and (2) waive all rights to contingent adjustment of flowing gas rates as provided by the Commission in area rate decisions heretofore decided, for flowing gas which the seller-applicant produces in the same geographical pricing area as the pricing area of the production covered by the application made under this Section.

n. Upon the filing of an application under this Section, deliveries pursuant to the provisions of the tendered contract may be commenced, pending review of

such application by the Commission. Notice of commencement of deliveries shall be given to the Commission within ten days after deliveries first commence, and shall include all pertinent information concerning the deliveries. Any such deliveries so commenced may be terminated (1) if such contract for any reason shall terminate or be terminated prior to the issuance by the Commission of a final order upon review of such application, or (2) upon the issuance of a certificate containing conditions unacceptable to the party adversely affected. If the Commission by final order shall deny such application, or if the party or parties to the contract adversely affected shall not accept the terms and conditions prescribed by the Commission, deliveries thereunder shall be terminated. Within thirty days after termination of deliveries, the seller shall notify the Commission of such termination, and shall report the date of termination, volumes delivered, and revenues received.

o. If the parties elect to commence deliveries as set forth in subsection n., such deliveries will be made at rates no higher than the prevailing area ceiling rate and shall so continue for six months unless the Commission has made its final orders on the application at an earlier date; at the end of such six-month period (if the Commission has not made its final order), the seller upon the filing of a notice of change in rate pursuant to Section 154.94 of the Commission's Regulations shall be entitled to receive without refund obligation and the purchaser shall be entitled to pay, the rates specified in the contract, and such contract rates shall continue as the effective rates until the Commission enters its final order on the certificate application.

(B) The amendment provided for herein shall be effective as of the date of issuance of this order.

(C) The Secretary of the Commission shall cause prompt publication of this order to be made in the Federal Register.

DOCKET NO. R-441

RESPONDENTS TO OPTIONAL PROCEDURE

Independent Producers

Amoco Production Co.
Atlantic Richfield Co.
Aztec Oil and Gas Co.
Perry R. Bass
California Co., Division of Chevron
Cities Service Oil Co.
Estate of E. Cockrell, Jr.
Continental Oil Co.
Exchange Oil and Gas Corp.
James Forgotson, Sr.
General American Oil Co. of Texas
GHK Corp.
Gulf Oil Corp.
Humble Oil & Refining Co.
Inexco Oil Co.
Kansas-Natural Gas Co., Inc.
Kerr-McGee Corp.
Lake Washington, Inc., U.S. Oil of Louisiana, Inc.

Marathon Oil Co.
Mesa Petroleum Co.
Mobil Oil Corp.
Phillips Petroleum Co.
Joints Comments & Suggestions of Twelve Co. Producer Group
Shell Oil Co.
Sun Oil Co.
Superior Oil Co.
Tenneco Oil Co.
Texaco Inc.
Texas Pacific Oil Co., Inc.
Union Drilling, Inc.
Union Oil Co. of California

Pipeline Companies and Pipeline Groups

American Natural Gas System
Colorado Interstate Gas Co.
Columbia Gas System Service Corp.
Consolidated Gas Supply Corp.
El Paso Natural Gas Co.
Iroquois Gas Corp.
Natural Gas Pipeline Co. of America (Peoples Gas Light & Coke and North Shore Gas Co.)
Northern Natural Gas Co.
Pacific Gas Transmission Co.
Panhandle Eastern Pipe Line Co.
Southern Natural Gas Co.
Southern Union Gas Co.
Tennessee Gas Pipeline Co.
Transcontinental Gas Pipe Line Corp.
United Gas Pipe Line Co.
United Natural Gas Co.
Pennsylvania Gas Co.

Distribution Co's. and Distribution Groups

Associated Gas Distributors (AGD)
Boston Gas Co., et al. (16 Co's.)
California Distributor Group
Central Illinois Public Service Co.
Consumers Power Co.
Illinois Power Co.
Long Island Lighting Co.
Northern Illinois Gas Co.

State Commissions, Cities and Municipalities

Public Service Commission of Missouri
State of California and PUC of California
City of Chicago
Citizens Gas and Coke Utility (City of Indianapolis)
State of Indiana, Public Service Commission
State of Kansas Corporation Commission

Memphis Light, Gas and Water Division (City of Memphis)
State of New Mexico
Public Service Commission of New York
North Carolina Utilities Commission
Salt River Project Agricultural Improvement & Power District

Congressional and Governmental Agencies

Bill Archer, Congressman, Texas
Lloyd M. Bentsen, Senator, Texas
Department of Commerce
Congress of the United States, Joint Economic Committee
Concerned Congressmen (21 Members)
Congressman John E. Moss
Congressman John D. Dingell
Congressman Ogden R. Reid
Congresswoman Bella S. Abzug
Congressman Joseph P. Addabbo
Congressman Herman Badillo
Congressman Jonathan B. Bingham
Congressman Silvio O. Conte
Congressman Jerome R. Waldie
Congressman Charles C. Diggs, Jr.
Congressman Thaddeus J. Dulski
Congressman William D. Ford
Congressman Seymour Halpern
Congressman Robert L. Leggett
Congressman Thomas M. Rees
Congressman Benjamin S. Rosenthal
Congressman Charles A. Vanik
Congressman Phillip Burton
Congressman Bertram L. Podell
Congressman Lionel Van Deerlin
Congressman George E. Danielson
Marlow W. Cook, Senator, Kentucky
William P. Curlin, Jr., Congressman, Kentucky
Environmental Protection Agency
Philip A. Hart, Senator, Michigan
Department of Interior
Walter Jones, Congressman, North Carolina
Warren G. Magnuson, Senator, Washington
Wilmer D. Mizell, Congressman, North Carolina
Neal Smith, Iowa, and Silvio O. Conte, Massachusetts, Congressmen

Trade and Consumer Groups

American Public Gas Association, American Public Power Association and Consumer Federation of America
Consumers Assembly of Greater New York
Gas Appliance Manufacturers Association
Independent Natural Gas Association of America (INGAA)
Independent Petroleum Association of America (IPAA)
Institute for Public Interest Representation (S.O.U.P.)
Kansas Municipal Utilities, Inc.
Public Interest Research Group

Other

Hamilton Treadway
Anthony R. Martin—Trigona (P.O.W.E.R.)
Midrex Division (Midland-Ross Corporation)
Natural Resources Defense Council, Inc. (Environmental Group)

APPENDIX E

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Pinkney Walker and Rush Moody, Jr.

OPTIONAL PROCEDURE FOR CERTIFICATING NEW PRODUCER SALES OF NATURAL GAS, DOCKET NO. R-441

ORDER NO. 455-A

ORDER CLARIFYING ORDER, AND DENYING APPLICATIONS FOR REHEARING AND STAY

(Issued September 8, 1972)*

American Public Gas Association, American Public Power Association and Consumer Federation of America (the Associations) jointly filed on August 10, 1972, an application for rehearing of the Commission's Order No. 455, Optional Procedure for Certificating New Producer Sales of Natural Gas, Docket No. R-441, issued August 3, 1972, 48 FPC 218 (37 F.R. 16188, 8/11/72). Gulf Oil Corporation (Gulf) similarly filed on August 23, 1972, an application for rehearing of said Order and also requested clarification of the Order with respect to warranty contract sales. On August 29, 1972, twenty-one "Concerned Congressmen" (Congressmen) filed an application for rehearing and motion for stay of the Order. On September 1, Texaco Inc. filed its motion for reconsideration,[1] and on September 5, 1972, the Public Service Commission for the State of New York, Continental Oil Company, Amoco Production Company, and Phillips Petroleum Co., each filed a petition for rehearing of said Order.[2] We shall discuss the applications for rehearing, motions for clarification, and motions for stay separately, except in such instances as the applicants may have raised the same point.

At the outset, the Associations and "Concerned Congressmen" contend (1) we are without authority to promulgate Order No. 455, and (2) Order No. 455 amounts to deregulation. Our authority to issue Order 455 emanates from Congressional delegation of such authority in the Natural Gas Act, as well as the procedural mandates of the Administrative Procedure Act, and the judicial precedents interpreting such statutes. In Order No. 455, we set forth with specificity both our authority to promulgate such a policy statement and the judicial support for the procedures which were adopted (pp. 224-226). In fact, in order to afford the widest public participation possible, we followed the traditional rulemaking procedures—something which we need not have done for a policy statement.

The irrefutable fact is that this Nation is confronted with an energy crisis, and more particularly, a gas shortage. This Commission has used the breadth of its authority to deal with the problems which had arisen over the last decade. This Commission has the flexibility to adapt its policies to changing circumstances[3] and by issuing Order No. 455, we have carried forth our responsibilities as delegated to us by the Congress.

The "Concerned Congressmen" and Associations contend we erred in adopting Order No. 455 without a full trial-type hearing. There is no statutory requirement requiring a full evidentiary hearing prior to the issuance of a policy statement.[4] We issued a notice of our proposed rule and solicited written comments from all interested parties. This is the only "hearing" required when an agency proceeds under its informal rulemaking authority.[5] We reiterate that no rates have been prescribed by Order No. 455[6] and that individual hearings will be held on each certificate application so filed at which time any interested party, including petitioners, may intervenue and present evidence.[7]

It has been contended that we have deregulated natural gas producers by issuing Order No. 455. The scope of our policy statement is limited to gas produced from a well or wells commenced after April 6, 1972, or gas not previously sold in interstate commerce except under the provisions of Order Nos. 402, 418 or 431. The area rate framework, initiated in 1960, and completed for all major producing areas except Rocky Mountain, is unaffected by Order No. 455. We have provided an optional procedure for certificating new gas sales. Contrary to the "Concerned Congressmen's" contention, this procedure is not without standards. Certification will be subject to the standards of "just and reasonable" in Section 4 and "present and future public convenience and necessity" of Section 7. We will apply those standards of the Natural Gas Act as interpreted by the courts. In other words, only after a hearing, and Commission findings, subject to Sections 4 and 7, will such a certificate be granted. This is not decontrol. It is the "end result" of our actions which must be judged,[8] and if Order No. 455 assists in alleviating the gas shortage, this Commission is fulfilling its obligations under the Natural Gas Act.

The Associations contend that the optional procedure as promulgated in Section 2.75 of the Commission's General Rules of Practice and Procedure, General Policy and Interpretations, exempt new gas sales from the requirements that the rates and charges therefor be just and reasonable. Such a contention is without merit. Section 2.75l specifically states that the rates, charges, and services to be certificated under the optional procedure shall be just and reasonable and required by the present and future public convenience and necessity. In other words, such certification shall conform to the standards of Sections 4 and 7 of the Natural Gas Act.

The second contention of the Associations that the major premise of the optional procedure is to set natural gas rates for new sales solely upon "market conditions" is similarly without merit. This contention is made without regard or recognition of the evidentiary burden imposed upon a seller-applicant by Section 2.75g, and upon the purchaser by Section 2.75h. We are not foreclosed from considering "market conditions" any more than we are prohibited from considering "non-cost" factors in an area rate proceeding. *Permian Basin Area Rate Cases*, 390 U.S. 747, 791, 795, 815 (1968); *Austral Oil Co.* v. *F.P.C.*, 428 F.

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*Published in the Federal Register on September 15, 1972 (37 F.R. 18721).

[1] On September 5, 1972, Amerada-Hess filed a telegraphic joinder in Texaco's petition.

[2] Superior Oil Co. filed a motion for reconsideration on September 7, 1972, and the issues raised in that motion shall be discussed here.

[3] *Permian, infra* at 800, 816 n. 99; *Wisconsin* v. *F.P.C.*, 373 U.S. 294, 309 (1963); *F.P.C.* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).

[4] See *U.S.* v. *Allegheny-Ludlum Steel Corp.*, 32 L. Ed. 2d 453, 464-5 (1972); *Siegel* v. *A.E.C.*, 400 F. 2d 778 (CADC-1968); *Pacific Coast European Conference* v. *U.S.*, 350 F. 2d 197 (CA9-1965), cert. denied 382 U.S. 958 (1965); *Long Island RR Co.* v. *U.S.*, 318 F. Supp. 490 (E.D.N.Y. 1970); Attorney General's Manual on the Administrative Procedure Act (1947) at p. 78.

[5] *Ibid.*

[6] APGA argues we have retroactively set rates. Initially, no rates have been prescribed by Order No. 455. Further, rules which affect existing rights have been upheld on numerous occasions. *E.g.*, *WBEN, Inc.* v. *U.S.*, 396 F. 2d 601, 609, 618, 622 (CA2-1968), cert. denied 393 U.S. 914 (1968); *Air Lines Pilots Assn., Int.* v. *Quesada*, 276 F. 2d 892, 896 (CA2-1960), cert. denied 366 U.S. 962 (1961).

[7] *P.S.C. of N.Y.* v. *F.P.C.*, 467 F. 2d 361 at 368 (CADC-1972). Compare *Wisconsin* v. *F.P.C.*, 292 F. 2d 753 (CADC-1961); *Wisconsin* v. *F.P.C.*, 303 F. 2d 380, 387 (CADC-1961), affirmed 373 U.S. 294 (1963).

[8] *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581, 625 (1945).

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2d 407, 426, 441 (CA5–1971). Indeed, to ignore such conditions would be to act contrary to the Fifth Circuit's mandate that we must consider market conditions and the industry's capital requirements to meet the consumer needs for reliable and adequate gas service. Id. 428 F. 2d at 435, 433–4. We would be derelict in our responsibilities if we did not consider the intrastate market prices and the ability of interstate pipelines to obtain the necessary gas reserves to meet the needs of jurisdictional customers. Order No. 455 represents another step in this Commission's efforts to deal with the gas shortage, and as such, is experimental in the same context as our advance payments policy (See Order No. 455 at pp. 225–226). So too was the initiation of producer area rates experimental in the 1960's and the Supreme Court clearly recognized that we may develop more effective regulatory tools. *Permian, supra* at 772 n. 37, 790, 800. Our action here is, of course, an optional procedure, and while not replacing area rates, we reject the idea that area rates is the *only* method by which producer rates can be determined.

"Concerned Congressmen" indicate our actions will be futile because we erred in not estimating the additional forthcoming new gas reserves. The short answer is that there will be no certificates issued pursuant to Section 2.75 of our Regulations except when the gas so applied for is dedicated to the jurisdictional market. In other words, in each individual certificate hearing, we will know what volumes of gas reserves will be dedicated, prior to the issuance of a certificate.

The Associations contend there is no gas supply shortage. Counsel for APGA's arguments have been rejected by two United States Courts of Appeals [9] and the gas shortage has been recognized by the United States Supreme Court.[10] Counsel for the Associations would have this Commission ignore the curtailments of firm gas customers by seven major interstate pipelines during the 1971–1972 heating season. Twenty-eight pipelines have now filed curtailment plans. Firm requirement deficiencies during the 1972–1973 heating season are expected to be even more severe.[11] In other words, new customers are being denied gas service and the service to existing customers is being reduced. The salient fact is that there is a shortage in deliverable gas reserves contrary to the national interest.

Counsel for Association contend we have "denied the consumers of a right to a hearing on the record of the facts relating to the shortage issue." Counsel, representing the American Public Gas Association, advanced similar arguments in the Rocky Mountain proceeding, involving initial rates and has sought court review and in the *Hugoton-Anadarko* area rate case.[12] In the latter case, the Ninth Circuit, in affirming the Commission's orders in full, rejected the Association's arguments. *People of State of California, supra.* In each of these proceedings, among others, counsel had a "right to a hearing on the record of the facts relating to the shortage issue." Other parties representing consumer interests and the Commission staff also participated in those proceedings. In each case, based upon a full evidentiary record, the Commission determined there was a gas shortage. While we will continue to provide a forum for counsel, inasmuch as the disappointed litigant has not submitted any evidence in this proceeding through written comments,

[9] *The People of the State of California* v. *F.P.C.*, 466 F. 2d 974 at 987–988 (CA9–1972); *City of Chicago* v. *F.P.C.*, 458 F. 2d 731, 747–9 (CADC–1971), cert. denied 405 U.S. 1074 (1972).

[10] *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 at 626 (1972).

[11] Data filed with the FPC by 15 pipelines indicate projected deficiencies of 1 trillion cubic feet or almost 10 percent of those pipelines' annual gas sales.

[12] Counsel advanced the same arguments on behalf of the Municipal Distributors Group in the Southern Louisiana area rate proceeding which is presently before the Fifth Circuit for review.

we will reject his unsupported allegations. However, in any certificate proceeding, counsel may, of course, submit such evidence at a public hearing, including that related to the "shortage issue".[13] However, in the interim, this Commission will rely, for purposes of determining the gas consumer needs of this Nation, on the *fact* that those needs are not being met. We will continue to rely on evidence of pipeline curtailments, investment in alternate energy sources and supplemental gas supplies, reports of shortages by state commissions, federal resource agencies, in addition to published data concerning exploratory and developmental well activity, the gas reserves of the interstate pipelines as reported to us on Form 15, the Potential Gas Committee, the Future Requirements Committee, Staff Report No. 2, and other relevant data.

"Concerned Congressmen" and Associations contend our action here violates Price Commission Regulations because the price increases are inflationary. The fact is that there are no price increases contemplated under Docket No. R–441 for gas already dedicated to the interstate market. The optional procedure is for new gas reserves, not already dedicated to the interstate market, to which an "initial price" will be determined as a condition to the certificate. That "initial price" will represent a just and reasonable determination of the lowest reasonable rate consistent with adequate service. An important policy consideration which we cannot ignore is that because of the gas supply-demand imbalance, unsatisfied gas demands are transferred to higher-priced alternate fuels, which both increases demand and prices for those fuels and in other energy markets, to the detriment of consumers. A continuation of the gas shortfall will likewise serve as a deterrent to economic recovery. Thus, our Order No. 455 balances the objectives of the Natural Gas Act and the Economic Stabilization Act of 1971.

"Concerned Congressmen" urge this Commission to recommend accelerated leasing of federal domain lands to the Department of Interior. As a matter of policy, we have urged, both by letters and other requests, for increased lease sales on federal lands in order to obtain the maximum efficient development of our domestic resource base. This Commission policy recognizes that the development of such resources is responsive to factors other than wellhead prices established by the Federal Power Commission, including *inter alia*, leasing policies on federal domain lands, tax policies, the relative attraction between domestic and foreign investments, and the industry's technological level concerning offshore operations.

The Associations assert that the provision in Section 2.75e for certification with or without pregranted abandonment is contrary to Section 7(b) of the Act. Suffice to say that Section 7(b) requires, *inter alia*, that no natural gas company may abandon jurisdictional service without having first obtained the lawful permission and approval of the Commission that the present or future public convenience and necessity permits such abandonment. Certainly, when an application for pregranted abandonment is before it for determination as to its certification, the Commission may make the necessary findings required by Section 7(b) of the Act.

The Associations alleged that the Commission erred in allowing pipeline-production, including affiliated companies, to utilize the optional procedure because they state "no arms length negotiation over prices exists in such situations." We have not opened Section 2.75 procedures to pipeline production, and as we stated in Order No. 455 (*supra*, p. 229, par 8) we will, "absent a showing of special circumstance, accept as conclusive the cost findings embodied in our area rate decisions, as such may be supplemented from time to time by appropriate Commission order." Thus, we can only reiterate that transactions between pipelines and affiliates, or subsidiary off-system sales, will be examined

[13] See *City of Chicago, supra*, at 749.

by us to assure that such transactions and "the proposed rates are reasonable and in the public interest." In any event, the fact of whether or not the transaction is conducted at "arms-length" is but one of many to be considered by us in making a just and reasonable determination.

In its request for clarification and rehearing, Gulf contends that exclusion of warranty contract sales from the optional certificate procedure of Order No. 455 is unduly discriminatory because, by its terms, it does not apply to such sales from wells commenced after April 6, 1972. The Commission reaffirms its intention to exclude warranty contract sales from the provisions of Order No. 455 because such contracts contemplate additional drilling, if necessary, in fulfillment of the volumetric warranty. Drilling under warranty contracts does not in itself result in increased gas supplies to the interstate market, and, therefore, it follows that sales under such existing contracts should not be eligible for the optional procedures of Order No. 455.

However, Gulf submits that a producer-seller should have the opportunity to amend its contract to be applicable to gas producer leases acquired, and wells drilled thereon after April 6, 1972, and to be able to demonstrate to the Commission that prices incurred in such acquisitions and drilling are in the public interest. That issue is pending for decision in another proceeding to which Gulf is a party, and we will not rule on that issue here.

The petition for rehearing of the Public Service Commission of the State of New York reiterates the contention made in its comments, filed in response to the notice herein, that we should exclude short-term contracts from certification under the optional procedure. New York in its petition for rehearing sets forth no facts nor does it advance any argument that we did not have before us when we determined not to condition Section 2.75e so as to exclude such short term contracts. Reconsideration of the matter has not caused us to change our determination. The duration of the contract will be one factor in our determination in the individual certificate proceeding.

Continental suggests that the Commission erred in failing to provide expressly that denial of an application by the Commission, or rejection of a certificate under the optional procedure by a seller, would vitiate and nullify all waivers made by the seller in connection with the application. Had we intended the waiver requirements of 2.75 to apply irrespective of whether certificates ever became effective under 2.75, we would have so stated. It is our intention that the waivers required by Section 2.75m are effective only in the event that the 2.75 application containing the waivers is approved by the Commission and the certificate thereunder accepted by the seller/applicant. If the Commission denies the application, or prescribes conditions which are unacceptable to the seller/applicant, the waivers which were made a part of the application are not binding upon the seller/applicant.

Continental and Texaco request clarification with respect to paragraph b(4) of Section 2.75, asking whether it is necessary for a seller/applicant to show that it has discharged its refund obligations under all prior orders or opinions of this Commission in order to be eligible for presentation of an application. We did not so intend. We require only that a seller/applicant show, with respect to the geographical pricing area in which the prospective seller would commit the gas under the optional procedure, that he has discharged, or is prepared by plan or program to discharge, refund obligations with respect to that geographic area. Thus, if a seller/applicant should owe refunds in Southern Louisiana but not owe refunds in the Texas Gulf Coast Area, the seller/applicant would be able to utilize

2.75 procedures for Texas Gulf Coast Area gas without regard to the status of its refund obligations in Southern Louisiana.

We have also been asked to clarify whether or not contract escalations approved by the Commission in a Section 2.75 proceeding would be self-operative or whether such would necessarily be subject to rate change filings under Section 4(e) of the Natural Gas Act. We believe that this inquiry is answered by *Episcopal Theological Seminary of the Southwest* v. *F.P.C.*, 269 F. 2d 228 (CADC–1959), cert. denied *sub nom.*, *Pan American Petroleum Corp.* v. *F.P.C.*, 361 U.S. 895 (1959), wherein it was held that *no* rate change could become effective without a 4(e) filing. This is not to say, however, that the Commission recedes from the basic position expressed in Order No. 455 that it intends to grant sanctity of contract to the full extent that the Commission can, absent amendment of the Natural Gas Act by Congress. It is our intention to consider applications under Section 2.75 and make a one time determination of the public convenience and necessity aspects of the certificate application and the justness and reasonableness of the rates therein proposed, both as to initial rates and as to definite escalations which might be embodied in the contract. For future definite escalations to become effective without a 4(e) filing will require amendment of the Natural Gas Act, through legislation such as that now pending before Congress.

It is most forcefully argued by Continental, Texaco, Phillips and Amoco that we have erred in outlawing certain types of escalation clauses in Section 2.75f and that the prohibitions of subsection f will operate as a disincentive to long-term commitment of natural gas to the interstate market. We are particularly urged to permit the inclusion of so-called "FPC clauses" or "area rate clauses" in contracts tendered for certification under Section 2.75.

If we did not intend to afford sanctity of contract to the fullest extent available to this Commission, we would be inclined toward sympathy with the producers' view. However, we think it inappropriate for us to sanctify a contract in the sense of guaranteeing that the price will not go down but deny the reciprocal sanctity that a certificated contract price will not rise.

We are of the firm opinion that the optional procedure should stand on its own as a means of producer rate regulation, and represent a true option to those buyers and sellers who choose the optional procedure over regulation under the area rate structure. To accept the requests of these applicants would permit them the benefits of the higher price obtainable under either system, a procedure which we decline to adopt.

The Commission further finds and orders that:

(1) Except for the clarifications in the order as herein provided, the applications for rehearing, motions for reconsideration, and motions for stay, are denied, inasmuch as no new facts or legal authorities have been presented which would require further modification of Order No. 455.

(2) Section 2.75b.4. is hereby amended to read as follows:

> The seller under such contract establishes that he has discharged, or is prepared by plan or program to discharge, refund obligations in the geographical pricing area in which the seller would commit gas under such contract, prescribed by prior orders or opinion of this Commission. It is provided, however, that any such seller may make the showing here required without prejudice to his claim in any case *now* pending on judicial review that such obligations were unlawfully imposed by the Commission.

APPENDIX F

The Natural Gas Act, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. 717, *et seq.*, provides in pertinent part:

Section 4, 15 U.S.C. 717c:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject

to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company [1a] or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into

effect; [1a] and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5, 15 U.S.C. 717d:

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-

gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Section 7, 15 U.S.C. 717f:

CONSTRUCTION, EXTENSION, OR ABANDONMENT OF FACILITIES; CERTIFICATE OF CONVENIENCE AND NECESSITY; CONDEMNATION PROCEEDINGS

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers,

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona

fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate,

and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Section 16, 15 U.S.C. 717*o*:

ADMINISTRATIVE POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commis-

sion shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

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There is no Appendix in this case, a motion having been made and granted dispensing with its printing.

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No. 74-883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

FEDERAL POWER COMMISSION,
Petitioner

v.

JOHN E. MOSS, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The American Public Gas Association, American Public Power Association, Consumer Federation of America and City of Chicago, Illinois, joint petitioners before the United States Court of Appeals for the District of Columbia Circuit,[1] hereby file this brief in opposition to the petition of the Solicitor General on behalf of the Federal Power Commission ("FPC" or "Commission") for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, and for the purposes of this brief in opposition, we adopt the introductory sections of the petition for a writ.

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[1] Their joint petition for review was docketed at No. 72-1846 and consolidated with *Moss* v. *FPC* at Nos. 72-1837, *et al.*

REASONS FOR DENYING THE WRIT

1. The Federal Power Commission in Order Nos. 455 and 455-A amended its General Rules of Practice and Procedure by including "Section 2.75 Optional Procedure for Certificating New Producer Sales of Natural Gas," subsection (e) of which provides that the Commission will consider applications for permanent certification, "either with or without pregranted abandonment." As stated in Order No. 455, the goal of the optional procedure is to obtain long-term commitments of gas to the interstate market, and, accordingly, the Commission's "consideration of individual applications will reflect due concern for the desirability of long-term dedications." (App. D at 44a.)

Because the optional procedure was designed for long-term gas sales contracts and hence the period of time from the approval of pre-granted abandonment in the certificate proceeding until the termination of service at the conclusion of the contract term is of such length, the United States Court of Appeals for the District of Columbia Circuit concluded that in this context "pregranted abandonment requires more clairvoyance than even the Commission's expertise reasonably encompasses." (App. A at 21a.) Not only is this conclusion eminently reasonable and correct on its face but in addition it is further buttressed by the fact that the Commission has been unable to cite one example in its 37-year history where a long-term certificate has been granted with the allowance of pre-granted abandonment. For the Court of Appeals to have held otherwise would render meaningless Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), which provides:

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means

> of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

Although the Commission was forced to concede before the Court below that the first standard of Section 7(b), i.e., depleted supply, can only be proved at the end of the contract term, it asserts that a determination of "the present or future public convenience or necessity" can take place during the original certificate proceeding, as much as 20 years before the abandonment occurs. The fatal and rather obvious flaw in the Commission's argument is that it is based on an interpretation of "present" as meaning "today" instead of reading it in the context of Section 7(b) as a separate section of the Act calling for a separate hearing at the time when abandonment is contemplated at which time the producer must show either that its supply is depleted, or that the public convenience or necessity *at the time of* the proposed abandonment or thereafter, i.e., present or future, will be served by the granting of the abandonment petition.

Any other interpretation would make no sense and would preclude a future Commission at the expiration of the long-term contract from requiring any showing at that time by a producer of why the public interest would be served if service were abandoned. As the Court of Appeals noted, "abandonment [under Section 2.75(e)] will not be subject to future review but will be completely untrammeled." (App. A at 21a.)[1] The impact on today's

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[1] Despite the Commission's protestations to the contrary (page 11 fn. 8 of its Petition), judicial review of the pre-granted abandonment issue at the time of certification will not make the abandonment any less untrammeled since, it is respectfully submitted,

interstate gas supply, which is already deficient, would be devastating if the Federal Power Commission had issued certificates with pre-granted abandonment in 1955 for the sale of a substantial quantity of gas under 20 year contracts. Today's Commission would be forced to sit idly by while consumers across the nation, who had grown dependent on this gas for the last 20 years, had their supplies suddenly and totally cut off since the producer would have to make no showing *at the time of abandonment* that the "present or future public convenience or necessity permit such abandonment." Congress obviously sought to avoid this untoward result through enactment of Section 7(b) of the Act.

The Commission's proposal to allow pre-granted abandonment in permanent certificates under Section 2.75(e) was therefore correctly struck down by the court of appeals since it ignores the teaching of *Sunray Mid-Continent Oil Company* v. *FPC*, 239 F.2d 97, 101 (10th Cir. 1956), *reversed on other grounds*, 353 U.S. 944 (1957), that:

> "No single factor in the Commission's duty to protect the public can be more important to the public than the continuity of the service furnished."

As this Court recently held in striking down an administrative attempt to deregulate certain gas producers:

> ". . . It is not the Court's role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the legislature where the public interest may be considered from the multifaceted points of view of the representational process." [*Federal Power Commission* v. *Texaco*, —— U.S. ——, 41 L Ed 2d 141, 158 (1974).]

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the reviewing court at the time of certification will suffer from the same lack of clairvoyance as the Commission concerning the public convenience or necessity some 20 years hence.

2. The Commission has premised its argument for retaining Section 2.75(e) on the assertion that:

> ". . . some producers are reluctant to sell their gas in interstate commerce for fear of making an indefinite commitment to that market. The availability of pre-granted abandonment makes it possible for the Commission to eliminate that fear, in appropriate cases and consistent with the public interest, by authorizing termination of the service on a date certain." [Petition at 11.]

Thus, it is clear that this Commission is willing to allow a producer at the end of the contract term to abandon the sale of gas to the interstate market simply because that producer would rather sell its gas in the unregulated, intrastate market, thereby eliminating the "fear of making an indefinite commitment" to the interstate market.

This is not only an inappropriate reason for approving pre-granted abandonment, but the desire to terminate interstate service in order to sell that same gas intrastate can never be an acceptable reason for granting abandonment, even in a Section 7(b) proceeding which takes place at the time the requested abandonment is to occur. Such was the holding of *Michigan Consolidated Gas Co.* v. *FPC*, 108 U.S. App. D.C. 409, 419, 283 F.2d 204, 214, *cert. denied*, 364 U.S. 913 (1960), wherein the D. C. Circuit, in an opinion joined in by Chief Justice (then Judge) Burger, declared:

> "If it wants to abandon service because it must now share that market, or *because it prefers to use that gas for more profitable unregulated sales*, or because it wants to be rid of what it considers a vexatious servitude, these are not reasons for granting its request." [Emphasis supplied.]

Furthermore, if a producer's desire to sell its gas at the conclusion of the interstate contract's term were

considered to be a valid reason for approving pre-granted abandonment, all of the producers which qualify for the optional certificate procedure may claim that they will not sell their gas in the interstate market at the present time unless their certificates provide for pre-granted abandonment. If this is permitted to occur,

> ". . . the way would be clear for every independent producer of natural gas to seek certification only for the limited period of its initial contract with the transmission company, and thus automatically be free at a future date, untrammeled by Commission regulation, to reassess whether it desired to continue serving the interstate market." [Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. 137, 142 (1960).]

The result of allowing pre-granted abandonment to those producers whose long-term contracts are certificated under Section 2.75 would be to render the other powers of the Commission enumerated in Section 7 of the Natural Gas Act, 15 U.S.C. § 717f inoperative since, in the words of the 10th Circuit in *Sunray Mid-Continent Oil Co.* v. *FPC*, 239 F.2d 97, 101 (10th Cir. 1956), *reversed on other grounds*, 353 U.S. 944 (1957),

> "[e]ach of these powers is directly concerned, among other things, with providing the public adequate, reasonable, and continuous service. Each one of these powers would be a useless one if the natural gas companies could set, at the initiation of their public service, the date at which they would withdraw, abandon or cease their service."

3. The FPC's attempt to persuade this Court that it must review the Court of Appeals' decision because the lower Court's denial of pre-granted abandonment under the optional procedure may cast a shadow over the pre-granted abandonment feature of the Commission's limited-term certificates for short-term producer sales (18 CFR § 2.70) must be rejected because the Court of Appeals

did not comment upon Section 2.70, which was not before that Court for review, and, in its discussion of the lack of "clairvoyance" on the part of the Commission, the Court was obviously speaking in terms of certificates for contracts of long duration. (*See* App. A at 20a-21a.)

As noted *supra*, the Commission stated unequivocably in Order No. 455 that the purpose of the optional procedure is to attract long-term dedications of gas to the interstate market (*see* App. D at 44a), and the considerations of whether pre-granted abandonment is unlawful in this situation are not the same as those involved in determining the lawfulness of pre-granted abandonment in the context of short-term certificates. The Commission also seems to realize that this is a makeweight argument since it couches its assertion of the effect of the Court of Appeals' decision on limited-term certificates in such terms as "*arguably* affects" the validity of pre-granted abandonment in these short-term certificates and "*may*, in the Commission's judgment, deter" new dedications of gas under Section 2.70. (Petition at 12.) There is no evidence, much less assertion, that this is in fact the case.

CONCLUSION

The petition for a writ of certiorari should be denied. Section 2.75(e) contravenes the plain meaning and intent of Section 7(b) of the Act that the Commission determine the propriety of a proposed abandonment at the time of the proposed abandonment; the standard which the Commission seeks to apply in granting pre-granted abandonment, i.e., that the producer has demanded as a prerequisite for committing the gas to the interstate market that the sale be automatically terminated at the end of the contract term so that the producer will be free to sell the gas in the unregulated intrastate market, has already been found wanting by this Court

and the several courts of appeals to consider the matter; and finally the Commission's half-hearted attempt to make it appear that in striking down the pre-granted abandonment feature of the optional procedure, the Court of Appeals somehow affected short-term certificates, is without any basis in fact. In brief, there is no compelling reason for this Court to review the eminently correct conclusion of the United States Court of Appeals for the District of Columbia Circuit that Section 2.75(e) of the Federal Power Commission's Rules and Regulations is unlawful and must be set aside.

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Supreme Court of the United States

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BRIEF FOR MOSS ET AL. IN OPPOSITION

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February 20, 1975

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BRIEF FOR MOSS ET AL. IN OPPOSITION

QUESTION PRESENTED

Whether the Federal Power Commission may, at the time it grants a producer a certificate under Section 7(c) of the Natural Gas Act to commence a sale of natural gas in interstate commerce, simultaneously "pre-grant" that producer authority to abandon its sale, under Section 7(b) of the Act, when its contract expires, without regard to the continuing need of the public for service at the time abandonment will be effected.

STATEMENT

In April 1972, the Federal Power Commission--all of whose members had gone on record as opposing continued federal regulation of interstate sales of natural gas by producers--

announced that it was considering an "optional procedure" for regulation of producers. Premised on the Commission's view that regulation under the Natural Gas Act had the effect of discouraging producer sales in interstate commerce, the proposed "optional procedure" would substantially diminish the impact of regulation on producers electing to come under the new procedure: they would be free to charge rates in excess of the applicable area ceilings; they would be free during the term of their contract to increase their rates without a contemporaneous investigation into the propriety of the increase; and they would be free to abandon service at the end of the contract term.

The optional procedure was vigorously opposed by various parties, including respondents, a group of twenty-one congressmen* who were concerned that the Commission's program amounted to deregulation without congressional sanction.

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* Respondents are John E. Moss, John D. Dingell, Ogden R. Reid, Bella S. Abzug, Herman Badillo, Jonathan B. Bingham, Phillip Burton, Silvio O. Conte, Charles C. Diggs, Jr., George E. Danielson, Thaddeus J. Dulski, William D. Ford, Seymour Halpern, Robert L. Leggett, Bertram L. Podell, Benjamin S. Rosenthal, Robert O. Tiernan, Lionel Van Deerlin, Charles A. Vanik, Jerome R. Waldie, and Sidney R. Yates. At the time of initiation of the proceedings below, each was a duly elected member of the United States House of Representatives.

Despite such opposition, however, the Commission, in August 1972, without holding an evidentiary hearing and without undertaking any evaluation of the anticipated benefits as against the probable costs of its new program, adopted the new "optional procedure" substantially in the form originally proposed, Order No. 455, 48 FPC 218. Following the Commission's denial of rehearing, Order No. 455-A, 48 FPC 477, respondents petitioned for review in the United States Court of Appeals for the District of Columbia Circuit.

The opinion of the court of appeals which is the subject of the Commission's instant petition for certiorari was issued on August 15, 1974, Moss v. F.P.C., 502 F.2d 461. Written by Judge Robb for a unanimous panel (Judges Tamm, MacKinnon, and Robb), the opinion, while sustaining the Commission's action in major part, reflects the court's considerable difficulty with the legality of the Commission's optional procedure.

1. On the principal issue--the standard to be used to fix prices under the "optional procedure", the court noted that "the Rule itself is ambiguous" and was "open to the construction that contract rates will be certified automatically as just and reasonable" (Pet. App. A 9a)--a construction that under this Court's recent decision in F.P.C. v. Texaco Inc., 417 U.S. 380, would render the rule invalid. The court, however, concluded that it should sustain the rule on the Commission's representation that in reviewing rates under the optional procedure the established standards of Section 4 of the Act--requiring consideration of the seller's

costs--would be respected. The court held (Pet. App. A 11a):

> "If in weighing the evidence the Commission violates those substantive standards, the aggrieved party will have a remedy in the courts. On the present record, however, we must assume that the Commission will abide by the standards of the statute and the promises it has made. We cannot condemn the Commission on the theory that it may not do what it has promised to do."

2. On the challenge to the Commission's authority to approve future rate increases in advance, the court of appeals noted that "any increases initially approved remain subject to review in future proceedings under Section 4(e)"--i.e., a future Commission could determine to suspend the increase and require justification for the increase at the time of its proposed effective date (Pet. App. A 13a). And while declining to bar the Commission's endeavor to make an advance determination of the reasonableness of future increases, the court indicated that it was "skeptical about the ability of the Commission to succeed in this endeavor" (id.):

> "Whether it succeeds will depend upon the evidentiary basis for the escalations proposed in a given contract and the reasonableness of Commission findings and projections supporting and approving such escalations. The question is one of

> proof which can be answered only on a record setting out a particular proposal and the evidence supporting it."

3. The court sustained without qualification a provision of the new rule that would permit an applicant under the optional procedure to commence service immediately upon the filing of its application, and if the application had not been disposed of within six months, to charge the contract price free from refund obligation even if the subsequent decision on the merits should conclude that the contract price exceeded the maximum allowable under the optional procedure (Pet. App. A 14a-16a).

4. Despite its predisposition to interpret the provisions of the Commission's rule in a manner that would render it lawful under the Natural Gas Act, the court could find no basis whatever for the "pregranted abandonment" provision of §2.75(e) of the Regulations. Section 7(b) of the Act prohibits a natural gas company from abandoning service without permission from the Commission, "after due hearing, and a finding by the Commission . . . that the present or future public convenience or necessity permit such abandonment." Under §2.75(e) the Commission would "pregrant" abandonment authority at the time of initial Section 7(c) certification--some five or ten or twenty years in advance of actual abandonment, and without regard to the continuing need of the public for service. The court noted that "pregranted abandonment requires more clairvoyance than even the Commission's expertise reasonably encompasses" (Pet. App. A 21a), and accordingly held that such procedure was not contemplated or authorized by Section 7(b).

The Commission's applications for rehearing and for rehearing en banc were denied, without dissent, on September 19, 1974, and the Commission's petition for a writ of certiorari in this Court followed.

ARGUMENT

The Commission's petition for a writ of certiorari seeks to review but a single part of an integrated court of appeals' decision. That decision was carefully and thoughtfully drafted: it recognized that there was substantial merit to the position urged by Moss et al. that the "optional procedure" amounted to partial deregulation, yet it sought to interpret the various provisions of the new rule in a way that would render them consistent with the Natural Gas Act, and, as thus interpreted, capable of being sustained. It was able to follow this approach with each of the challenged provisions but one--the "pregranted abandonment" provision.

The holding of the court below on the abandonment issue is eminently correct; it is not in conflict with any holding by this Court or by any court of appeals, but on the contrary is wholly consistent with every important judicial interpretation of the abandonment provision of the Natural Gas Act; and denial of certiorari in this case would not hamper any important Commission policy under the Natural Gas Act. Moreover, because the challenged holding is, as we have noted, an integral part of a broader approach, grant of certiorari, to be meaningful, would have to bring before the Court all aspects of the Commission's optional procedure regulation.*

1. The Decision Below Is Wholly Consistent With the Statute and With Prior Decisions of This Court and Other Courts of Appeals.

In its effort to persuade this Court to grant certiorari, the Commission states that the decision below "conflicts with decisions of this Court and the Tenth Circuit" (Pet. 6). The Commission is plainly mistaken. No court has ever held that the Commission may, at the time it authorizes the commencement of a sale in interstate commerce, "pregrant" abandonment authority to become effective ten or twenty years later, at the end of the contract term. It is, of course, true that absent regulation--and specifically absent Section 7(b) of the Act--a seller commencing a sale would, without more, be contractually free to discontinue service at the end of the contract term. But as the decided cases under Section 7(b) make clear, natural gas service, once commenced, normally induces a public need in its continuation that precludes abandonment absent a finding that

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* While we do not believe that certiorari is warranted with respect to any aspect of the decision below, we believe that the piecemeal approach urged by the Commission would be especially unfortunate, and accordingly we are, contemporaneously with the filing of this brief in opposition, filing a conditional cross-petition for certiorari on the remaining issues in the case.

the service is no longer required or that alternative service can be obtained, see, e.g., Sunray Oil Co. v. F.P.C., 364 U.S. 137 at 143, 152-54, 156 (1960); Michigan Consolidated Gas Co. v. F.P.C., 283 F.2d 204 (D.C. Cir. 1960), cert. denied, 364 U.S. 913; Transcontinental Gas Pipe Line Corp. v. F.P.C., 488 F.2d 1325 (D.C. Cir. 1973), cert. denied, 417 U.S. 921.

Prior to the issuance of its optional procedure rule, the Federal Power Commission had never held that it had power under Section 7(b) to "pregrant" abandonment years in advance of the date on which abandonment is to occur; in consequence, neither this Court nor any court of appeals had any occasion to pass on whether "pregranted abandonment" would be consistent with the requirements of Section 7(b).

The Commission's present attempt (Pet. 6-10) to argue that an 18-year old Tenth Circuit decision holds to the contrary is altogether unpersuasive: the case involved no question of "pregranted abandonment" and rests on an entirely different set of facts; indeed, the issue was never squarely decided but became moot prior to decision. The Commission's claim (Pet. 6, 9-10) that the opinion below "conflicts with [the] decision of this Court" in Sunray Oil Co. v. F.P.C., 364 U.S. 137 is absurd. First, in Sunray this Court sustained the Commission's grant of a certificate unlimited as to time (and certainly with no "pregrant" of abandonment). Second, the Court based its holding in large part on the need to maintain effective Commission control over abandonment under Section 7(b) to the end that consumers dependent on

continued service might be protected from the untoward consequences of abandonment. Third, the Court expressly stated (364 U.S. at 153, emphasis added):

> "If the Act does not contemplate that in a seller's contract there may inhere the power, of the contract's own accord, to effect a rate change at a future date unchecked by the regulatory scheme, it is hard to believe that it contemplated that contracts would of necessity have the effect of providing for a discontinuance of service, without further leave of the Commission."

Fourth, while noting that the precise issue presented by the instant case was not before it, the Sunray Court expressed considerable doubt "whether, in light of the Act's provisions--particularly the policy expressed in §7(b)--it would be proper for [the Commission] to rely" on considerations of the type urged by the Commission in the instant case to justify pregranted abandonment (364 U.S. at 158).

Thus, the Commission's assertion (Pet. 9) that this Court "specifically endorsed" the Tenth Circuit's 1956 Sunray holding is incorrect (it is also irrelevant, since what is significant for certiorari is conflict with a prior holding, not conflict with a prior "endorsement"); and the Commission's claim that "this Court has clearly stated that the Commission has authority . . . to approve the future termination of service . . . at the time of certifica-

tion" (id.) is belied by even a cursory reading of the Court's opinion.

It should be noted that the Commission's additional argument (Pet. 9-10) reflects a difference with the court of appeals not only as to the proper timing of a Commission determination that abandonment should be permitted--and it is surely difficult to deny the logic of the court's conclusion that a determination that there will be no need for continued service ten or twenty years in the future "requires more clairvoyance than even the Commission's expertise reasonably encompasses"--but even more importantly as to the standard to be used to gauge whether abandonment should be permitted. What the Commission is apparently saying is that since the producer dislikes and may refuse to participate in a regulated market, new sales to the interstate market will be encouraged if the level of federal regulation is reduced--i.e., if the regulated interstate market is made more like the unregulated intrastate market. But that issue was resolved against the Commission only last term. In F.P.C. v. Texaco Inc., 417 U.S. 380 at 400-01, this Court, after noting that regulation, particularly in time of shortage, might serve to discourage increased production of natural gas, went on to define the relationship between the Court, the Commission, and Congress:

> "It is not the Court's role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a

> proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process.
>
> "Attempts have been made in the past to exempt producers from the coverage of the Act, but these attempts have been unsuccessful. . . . For the Court to step outside its role in construing this statute, and insert itself into the debate on economics and the public interest, would be an unwarranted intrusion into the legislative forum where the debate again rages on the question of deregulation of natural gas producers."*

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* The Commission's contention (Pet. 2-3) that the optional procedure was necessary to avoid the "rate uncertainty which has prevailed since the early 1960's" is similarly answered by Texaco: rate regulation does induce a measure of uncertainty for the seller, but that is a consequence of the congressional determination that regulation is appropriate for the particular industry, and cannot be set aside by the regulatory agency. Further, the "uncertainty" of which the Commission complains derives not from the rate-making standard, which the optional procedure would modify, but from the statutory review provisions, which would remain unchanged under optional procedure. And, in any event, much of the litigation and delay in fixing "certain" just and reasonable rates over the past twenty years has been attributable to the very producers who would be the beneficiaries of the optional procedure.

2. The Decision Below Will Not Hamper Any Significant Commission Policy Under the Natural Gas Act.

The Commission contends (Pet. 12) that the decision below would, in "the Commission's judgment . . . be likely to undermine" the ability of the optional procedure program to attract supplies to the interstate market. The Commission further suggests (id.) that the decision below "may, in the Commission's judgment, deter new dedications of gas under the emergency certificate program as well." No statistical or evidentiary support is provided; the Court is left to rely on "the Commission's judgment", with no basis for evaluating whether that judgment is reasonable. No real threat to any program is alleged; the Commission merely claims that an untoward result "is likely" or "may" tend to occur. Vagueness aside, the real difficulty with these arguments is that they are but variants of the contentions rejected in Texaco. If, as the Commission continues to assert, regulation has untoward effects, the remedy lies in the amendment of the regulatory statute by the Congress, not by the Commission.

In stressing this Court's eminently correct response in Texaco, we should like to make clear that we do not accept the Commission's claims that its optional procedure and its emergency sales program have worked successfully for the consumer; to the contrary, they appear merely to have increased the price of gas without generating any increase in supply. But those arguments are for other cases, and do not require resolution by this Court here.

CONCLUSION

The petition for a writ of certiorari presents no basis for grant of the writ and should accordingly be denied. A fortiori, the Commission's conclusory request that it be granted summary reversal is, in the context of this case, wholly inappropriate.

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REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

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1. Respondents argue that Section 7(b) bars the Commission from simultaneously issuing a certificate for a *long-term* sale of natural gas and authorizing the producer to terminate the sale at the end of the term. In *Sunray I*, however, where the Tenth Circuit held that Section 7(b) is *not* a bar to authorizing future discontinuance of service at the same time that the service itself is certificated, the proposed sale was for a primary term of 10 years (239 F.2d at 98). And in *Sunray II*, where this Court endorsed the Tenth Circuit's holding in *Sunray I*, the proposed sale was for a term of 20 years (364 U.S. at 139). As those decisions make clear, the length of the underlying service contract has no bearing on the Commission's authority under Section 7(b) to authorize both the initiation and future abandonment of a jurisdictional sale, although the length of the term might, in a particular case, bear on the Commission's willingness to exercise that authority.

2. Respondents also argue that Order No. 455 adopts an improper standard for determining whether future termination of service should be approved. The Commission, they assert, would authorize a producer to abandon the sale of gas to an interstate purchaser "simply because that producer would rather sell its gas in the unregulated, intrastate market" (APGA Br. in Opp. 5). Nothing in Order No. 455 supports that assertion.

The Commission recognized that some producers may be unwilling to make an indefinite commitment to the interstate market and that otherwise available supplies were for that reason made unavailable to interstate purchasers. Order No. 455 is designed in part to attract those supplies to the interstate market by permitting the Commission, in an appropriate case and when the public interest would thereby be served, to give a producer advance assurance that his commitment will terminate on a date certain. But the Commission's willingness to take account of commercial realities does not imply a departure from the statutory public interest standard. The producer's desire for advance abandonment authority *triggers* the Commission's consideration of the request, but the decision whether to grant the request turns solely on the Commission's determination of the "present or future public convenience or necessity" under Section 7(b).

It is settled, of course, by this Court's decision in *Sunray II* that the Commission is not required to authorize future termination of service merely because the producer requests such authorization in its application for a certificate. It is also clear that the Commission is not required to approve abandonment of a previously certificated sale merely because the producer would prefer to serve the intrastate market.

But when an application for a certificate under the optional procedure established by Order No. 455 is conditioned upon advance authorization of future discontinuance—that is, when the producer agrees to serve a particular interstate purchaser for a specified term of years only if it is assured that its commitment may be terminated on a date certain[1]—it is surely within the proper scope of the Commission's authority to weigh the public need for the gas during the specified term, and to determine whether that need justifies giving the applicant the advance assurance requested. To deny that this is a proper element of the public interest would be to deprive the Commission of an essential tool for attracting needed incremental gas supplies to the interstate market during the present period of critical shortage.

Order No. 455 does not *compel* the Commission to authorize pre-granted abandonment upon the request of the applicant. It provides that the Commission may do so if, but only if, the Commission first determines "that the present or future public convenience and necessity per-

[1]If, for example, a producer discovers and develops a new supply of natural gas and enters into a contract to sell that gas to a specific purchaser commencing at a future date, he may be willing to sell the gas in the interim period to another interstate purchaser but only if he is assured that he may discontinue the interim sale at the end of the contract term so that he can fulfill his future contractual obligation to the original purchaser. See, *e.g., Tenneco Oil Co,* FPC Dkt. No. CI75-104 (order issued October 21, 1974).

mits such abandonment" (Pet. App. 55a).[2] That determination, of course, would in every case be subject to judicial review.

Respectfully submitted.

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Solicitor General.

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General Counsel,
Federal Power Commission.

MAY 1975.

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[2]See, *e.g.*, *Belco Petroleum Corp., et al.*, 49 FPC 1154, set aside and remanded on other grounds *sub nom. Consumers Union of the United States, Inc.* v. *Federal Power Commission*, C.A. D.C., Nos. 73-1792, *et al.*, decided October 7, 1974, where the Commission rejected a request for pre-granted abandonment under the optional certificate procedure on the ground that the record did not support the necessary findings. The Commission there stated (49 FPC at 1181-1182):

> It is clearly within our power to make a present determination of depletion of supply over time and the requirements of the present or future public convenience and necessity, given an adequate record. We have no factual basis for exercise of abandonment authority here, however, and Belco's application is therefore denied.

See also *Pennzoil Co.*, 50 FPC 977, 990.

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No. 74-883

In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

JOHN E. MOSS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a)[1] is reported at 502 F. 2d 461. The initial order (No. 455) of the Federal Power Commission (Pet. App. 31a-51a) and its order (No. 455-A) denying rehearing (*id.* at 52a-57a) are reported at 48 FPC 218 and 48 FPC 477, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a) was entered on August 15, 1974, and the Commission's timely petition for rehearing was denied on

[1] "Pet. App." refers to the appendix to the Commission's petition for a writ of certiorari.

September 19, 1974 (*id.* at 29a–30a). On December 12, 1974, the Chief Justice extended the Commission's time for filing a petition for a writ of certiorari to and including January 17, 1975. The petition was filed on that date and was granted on June 16, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission may, upon a proper finding of public need, simultaneously authorize both the sale of natural gas in interstate commerce by a producer and the abandonment of the sale at a future date certain.

STATUTES INVOLVED

Sections 4, 5, 7, and 16 of the Natural Gas Act, 52 Stat. 822–825, 830, as amended, 15 U.S.C. 717c, 717d 717f, and 717*o* are set forth in the appendix to this brief, *infra*, pp. 25–33.

STATEMENT

1. On August 3, 1972, the Federal Power Commission, as part of its continuing effort to alleviate the worsening shortage of natural gas, issued Order No. 455 (Pet. App. 31a–51a) establishing an "optional procedure for certificating new producer sales of natural gas" (*id.* at 31a). The procedure is designed to "stimulate and accelerate domestic exploration and development of natural gas reserves" (*id.* at 38a) by permitting the Commission to "certificate sales of gas not previously deliverable to the interstate market at

prices which are shown to be in the public interest" and to "lessen rate uncertainty which has prevailed since the early 1960's" (*id.* at 32a).

The Commission found that natural gas producers were frequently unable to rely upon the rates established by the Commission in its area rate orders, because those orders were subject to lengthy appellate review. "Consequently there is no assurance at the present time that a producer may not ultimately have to refund some of an initial rate * * * upon which the producer relied when it dedicated a new gas supply to the interstate market" (*id.* at 35a–36a). "This uncertainty," the Commission found, "has impeded exploration and development" (*id.* at 36a). "[T]he producer does not know * * * how much it will get if it develops and sells new gas to the interstate market. The producer knows for sure only that once it sells in interstate commerce it cannot stop deliveries" (*ibid.*).

Under the optional procedure established by Order No. 455, producers may tender for the Commission's approval contracts for the sale of new natural gas at rates that may exceed the maximum authorized by the applicable area rate order (*id.* at 46a).[2] The Com-

[2] On June 21, 1974, the Commission established a uniform national ceiling rate, superseding the area ceiling rates, for sales of natural gas produced from wells commenced on or after January 1, 1973, or newly dedicated to the interstate market on or after that date (Opinion No. 699, pending review *sub nom. National Rate Cases for New Gas, Shell Oil Co., et al.* v. *Federal Power Commission*, C.A. 5, Nos. 74–3330, *et al.*). The Commission thereafter issued Order No. 455–B, which, *inter alia*, amended the optional certificate procedure to permit the tendering of contracts in which the rates exceed the applicable area *or national* ceiling rates.

mission may then determine in a single proceeding whether the "public convenience and necessity" under Section 7(c) of the Act, 15 U.S.C. 717f(c), warrants the issuance of a certificate authorizing the sale and whether the rates called for by the contract, including any definite increments during the life of the contract, are "just and reasonable" under Section 4(a), 15 U.S.C. 717c(a) (*id.* at 47a, 57a). A permanent certificate issued by the Commission and accepted by the producer is not subject to change in later proceedings under Section 4 of the Act, 15 U.S.C. 717c, and the rates may be collected without risk of refund obligations (*id.* at 39a, 46a).[3]

At the time that it issues a permanent certificate of public convenience and necessity under the optional procedure, the Commission may also authorize the producer—upon appropriate findings of public need under Section 7(b) of the Act, 15 U.S.C. 717f(b)—to abandon the sale at the end of the contract term (*id.* at 46a, 55a). In that event, the producer would be free when the contract expires to discontinue deliveries to the original purchaser without having to demonstrate again that abandonment is consistent with the public convenience and necessity. Pregranted abandonment authority thus would give a producer assurance that his present sale will not in-

[3] The Commission recognized that it "cannot bind a future Commission not to invoke the *prospective* operation of Section 5" of the Act, 15 U.S.C. 717d, to alter the rates called for by the contract (Pet. App. 36a; emphasis added). It stated, however, that, "[t]o the extent that this Commission can grant certainty of rates, we do so" (*ibid.*).

definitely commit the gas to what may be a lower-priced interstate market.

In return for the rate certainty (and, in some cases, abandonment assurance) made possible by Order No. 455, a producer who accepts a permanent certificate issued under the order "waive[s] all rights to seek future rate increases under Section 4 * * *, other than price escalations" called for by the contract and certificated by the Commission (*id.* at 47a), and waives his right to benefit from any contingent escalations of the price of flowing gas provided for under the applicable area rate order (*id.* at 43a–44a, 47a).[4] In addition, the contract may not contain certain indefinite price escalation clauses (*id.* at 47a).[5]

2. Petitions for review were filed attacking the optional procedure on a variety of grounds. The court of appeals, however, upheld the Commission's order in all respects save one (*id.* at 1a–27a). It held that the order did not abandon the statutory "just and reasonable" standard for consideration of proposed rates under the optional certificate procedure (*id.* at 8a–11a); that the Commission may at the outset properly review and approve as just and reasonable both an initial rate and any fixed rate escalations provided for

[4] The validity of contingent price escalations for the Southern Louisiana producing area was upheld by this Court in *Mobil Oil Corp.* v. *Federal Power Commission*, 417 U.S. 283. The mechanics of the escalation provisions were described in the Court's opinion (417 U.S. at 298–299, n. 16).

[5] A common feature of contracts filed under the area rate procedures, for example, is an "area rate clause" that permits the seller to increase its rates to reflect increases in the applicable area maximum rate levels.

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in the contract (*id.* at 11a–14a); and that the Commission may, pending final action on an application, properly authorize the temporary delivery of gas under a contract at the prevailing area ceiling rate for a period of six months, and at the contract rate thereafter, without subjecting the producer to the risk of refund obligations (*id.* at 14a–16a).[6]

The court set aside the Commission's order, however, insofar as it provides that the Commission may, at the time it issues a certificate of public convenience and necessity, authorize the producer to terminate the sale at the end of the contract term (*id.* at 20a–21a). Such pre-granted abandonment, the court held, would violate Section 7(b) of the Act, 15 U.S.C. 717f(b), which prohibits the abandonment of any jurisdictional service or facility, except when the Commission has first given its approval upon a finding either that the available supply of natural gas is depleted "or that the present or future public convenience or necessity permit such abandonment."[7]

---

[6] Some of the respondents herein filed a conditional cross-petition for a writ of certiorari seeking review with respect to these issues. The cross-petition was denied on June 16, 1975 (No. 74–1045).

[7] Section 7(b) provides:

"No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

The court reasoned that Section 7(b) requires a finding by the Commission at the time of the proposed abandonment, not at the time of certification, that the abandonment is consistent with the public convenience or necessity. It stated (Pet. App. 20a–21a):

> Pregranted abandonment would leave a producer free to discontinue service to the interstate market, perhaps years after the original certification, with no contemporaneous obligation on the producer to justify withdrawal of service as consistent with the public convenience and necessity. We think Section 7(b) does not contemplate or authorize such procedure.
>
> * * * It appears to us * * * that pregranted abandonment requires more clairvoyance than even the Commission's expertise reasonably encompasses.

The court of appeals was "fortified in [its] conclusion" (*id.* at 21a) by its reading of this Court's decision in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, which upheld the Commission's authority to issue a certificate without time limitation to a producer who applied for a certificate limited in time to the duration of the underlying sales contract.

SUMMARY OF ARGUMENT

A. Under Section 7(b) of the Act, the Commission may approve an abandonment of service upon a finding either that the supply is depleted or that "the present or future public convenience or necessity permit such abandonment." Neither the language nor the purpose of the statute requires that the finding be

made at the time of the proposed abandonment rather than the time of certification. The Commission fulfills its statutory responsibility if it exercises proper control over the termination, as well as the initiation, of service. When to exercise that control is a matter left to the Commission's judgment.

Pre-granted abandonment may require the Commission to forecast future conditions in order to weigh the future public interest. But agencies commonly must apply their expertise in an effort to "forecast * * * the direction in which future public interest lies" (*Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29), and the courts, recognizing that any such prediction is fraught with uncertainty, give special deference to an agency's judgment about the future. There is no reason to assume that the Commission's forecasting under the optional certificate procedure will in every case be unreasonable, and there is consequently no justification for disapproving the pre-granted abandonment feature of this procedure on the basis of an abstract skepticism about the Commission's capacity to make reasoned judgments concerning the future. The time to test that capacity is when the Commission applies its judgment in individual cases.

Moreover, the Commission is not restricted to a narrow consideration of whether the gas will be needed for the interstate market after the proposed abandonment. When a producer's willingness to serve a particular interstate purchaser is conditioned upon his receiving advance assurance that the service may be terminated on a future date certain, it is within the

proper scope of the Commission's regulatory responsibility to consider whether the present need for the gas justifies giving the applicant the advance assurance requested.

That does not mean that the Commission will approve an abandonment simply because the producer would prefer to sell in the intrastate market. Though the producer's wish for a limited rather than unlimited commitment to the interstate market triggers the Commission's consideration of the request, the decision in every case will turn solely on the Commission's determination of the "present or future public convenience or necessity" under Section 7(b). The Act permits the Commission to employ its control over abandonment functionally to attract gas to the interstate market during the present critical shortage.

B. This Court's decision in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, supports the Commission's authority simultaneously to authorize the commencement and future termination of a sale of natural gas. The issue in that case was whether the Commission may properly issue a certificate of public convenience and necessity without limitation as to time, when the application sought only a certificate limited to a specified term of years. The Court held that the Commission was free to issue a certificate unlimited as to time, so long as it did so with the understanding that it was also free to issue a limited-term certificate.

The court of appeals in the present case erroneously read the *Sunray* decision as implying that the Act forbids the issuance of limited-term certificates. Since a

limited-term certificate is functionally and legally the equivalent of pre-granted abandonment, the court of appeals inferred that *Sunray* fortified the conclusion that pre-granted abandonment is improper.

Sunray in fact stands for the converse proposition. This Court's opinion in *Sunray* expressly characterizes as erroneous the notion that the Act precludes issuance of a limited-term certificate. The *Sunray* decision thus precludes, rather than fortifies, the decision of the court of appeals in the present case.

ARGUMENT

THE FEDERAL POWER COMMISSION HAS AUTHORITY UNDER THE NATURAL GAS ACT SIMULTANEOUSLY TO APPROVE BOTH THE INITIATION AND THE FUTURE ABANDONMENT OF INTERSTATE SALES OF NATURAL GAS BY PRODUCERS

The administrative order in this case established a procedure by which a producer may apply for, and the Commission (upon proper statutory findings) may issue, a certificate of public convenience and necessity simultaneously authorizing both the commencement of an interstate sale of natural gas and the termination of that sale on a future date certain. In setting aside the pre-granted abandonment feature of the Commission's order, the court of appeals held, in effect, that the Act would in no circumstances permit the Commission to authorize, at the time of certification, the future abandonment of a sale commenced under the optional certificate procedure.

That broad holding rests, we submit, upon a misinterpretation of this Court's decision in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, and upon the erroneous premise that the findings required for an abandonment must be made, and must relate to conditions as they exist, at the time of the proposed abandonment.

A. THE FINDINGS REQUIRED FOR THE COMMISSION'S APPROVAL OF AN ABANDONMENT UNDER SECTION 7(B) MAY PROPERLY BE MADE AT THE TIME OF CERTIFICATION AND MAY PROPERLY RELATE TO PRESENT AND FUTURE CONDITIONS AS THEY APPEAR TO THE COMMISSION AT THAT TIME

Section 7(b) of the Act, 15 U.S.C. 717f(b), provides that no natural gas company shall abandon any jurisdictional service or facility without the prior approval of the Commission after a hearing, and a finding either "that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." The court of appeals held that the findings required by Section 7(b) must be made at the time of the proposed abandonment rather than at the time of certification. It reasoned that Section 7(b) imposes upon a producer a "contemporaneous obligation * * * to justify withdrawal of service as consistent with the public convenience and necessity" (Pet. App. 20a), that the Act also contemplates a contemporaneous opportunity for judicial review of the administrative approval of abandonment (*id.* at 21a), and that the task of predicting, at the time of certification, what conditions will prevail at the time of a proposed future abandonment "requires more clairvoyance than even the Commission's expertise reasonably encompasses" (*ibid.*).

Nothing in the language or history of Section 7(b), however, supports the court's reasoning.

1. Abandonment may be predicated on a finding either that the gas supply is depleted or that "the present or future public convenience or necessity permit such abandonment" (15 U.S.C. 717f(b)). That determination, so far as the statutory language is concerned, can properly be made at the time of certification as well as at the time of the abandonment; Section 7(b) does not address the question of timing. Whenever the Commission approves (or disapproves) an abandonment, its action is subject to judicial review under Section 19(b) of the Act, 15 U.S.C. 717r (b). But neither that Section nor Section 7(b) implies that the opportunity for judicial review must be contemporaneous with the proposed withdrawal of service.

Thus, rather than imposing specific time requirements, Congress left it to the Commission to decide when to consider an abandonment application. Just as the statutory language is silent with respect to timing, the legislative history gives no support to the court of appeals' conclusion that consideration of an abandonment application may take place only at the time of the abandonment. The broad purpose of Section 7 (b)—to empower the Commission "to regulate the abandonment of service"[8]—is as fully served regardless of the stage at which the Commission exercises its control over the termination of service.

[8] H.R. Rep. No. 709, 75th Cong., 1st Sess. 2 (1937); S. Rep. No. 1162, 75th Cong., 1st Sess. 2 (1937).

2. Nor should consideration of future abandonment be foreclosed at the time of certification on the ground that it requires "more clairvoyance than even the Commission's expertise reasonably encompasses" (Pet. App. 21a). Fulfillment of an agency's regulatory responsibilities frequently requires some forecasting of future circumstances, and the standard of Section 7 (b)—"the present or future public convenience or necessity"—plainly envisions such forecasting by the Commission in connection with abandonment applications. See *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28–29.

As this Court stated in connection with the nearly identical public interest standard of Section 7(e) of the Act, 15 U.S.C. 717f(e) ("present or future public convenience *and* necessity"), " a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency" (*Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp., supra,* 365 U.S. at 29). And where, as in the case of abandonments under Section 7(b), "[f]orecasts as to the future are necessary to the decision," this Court has been especially loath to interfere with the particular applications of an agency's expert judgment, lest "uncertainties as to the future" be permitted to "paralyze the Commission into inaction" (*United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241).

Order No. 455 does not authorize any future abandonment of service; it establishes a procedure by which the Commission may consider requests for such authorization. If, pursuant to that procedure, the

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Commission approves a future abandonment on the basis of its assessment of the conditions that are likely to prevail at the time of the abandonment, that assessment will be subject to judicial review on the basis of the record and the Commission's articulated "deductions" (*Transcontinental Gas Pipe Line Corp., supra*, 365 U.S. at 29).

Particularly in view of the Court's deference to an agency's reasoned forecasting, there is no reason to anticipate at this stage that the Commission's assessments of the future will be set aside as unreasonable. The time to test the Commission's "clairvoyance" is not now, when the question is hypothetical and abstract, but when the Commission actually authorizes abandonment in an optional certificate proceeding.

This Court has rejected as "premature" similar abstract challenges to Commission orders establishing a regulatory scheme. Since the opportunity for subsequent judicial review provides adequate protection against arbitrary agency action, any such "broadside" challenge to the regulatory program is properly deferred "until the Commission has applied its scheme in individual cases" (*Federal Power Commission* v. *Texaco Inc.*, 417 U.S. 380, 392).

Indeed, it was on this basis that the court of appeals in the present case correctly rejected an attack upon those provisions of Order No. 455 that provide for review and approval by the Commission of both an initial rate and any fixed rate escalations specified in the contract. Respondents had argued that it would be impossible for the Commission to determine in advance the reasonableness of future rate escalations.

The court's response to that argument, we think, effectively answers as well the similar contention that the Commission cannot possibly forecast the public interest in approving future abandonments (Pet. App. 13a–14a):

> We cannot say as an abstract proposition of law that it is impossible for the Commission to make an advance determination of "reasonableness" in proceedings under Section 4. Although as a practical matter one may be skeptical about the ability of the Commission to succeed in this endeavor, we think it may make the attempt. Whether it succeeds will depend upon the evidentiary basis for the escalations proposed in a given contract and the reasonableness of Commission findings and projections supporting and approving such escalations. The question is one of proof which can be answered only on a record setting out a particular proposal and the evidence supporting it.

3. The court of appeals' error with respect to the abandonment question, however, reflects an even more fundamental misconception concerning the nature of the public interest considerations that bear upon the Commission's responsibilities under Section 7(b). The supposition underlying the court's "clairvoyance" reasoning is that the public interest findings required for an abandonment under Section 7(b) must relate to the conditions that exist at or after the time of the proposed termination of service and cannot take account of the period between the certification and the abandonment. That supposition is inaccurate.

Although a depletion of supply ordinarily would

be relevant only if it occurred at the time of the proposed termination, the broader public interest considerations under Section 7(b) are not so limited. The statute does not confine the Commission to a narrow consideration of whether the gas is likely to be needed for the interstate market after the proposed abandonment. To the contrary, it "requires the Commission to evaluate all factors bearing on the public interest" (*Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 391), including the public need for the gas during the period *prior* to the proposed termination.

Particularly in view of the severity of the present natural gas shortage, and the prospect that its impact may eventually be softened through the combined effect of conservation, increased supply, and consumer conversion to alternate fuels, it is reasonable for the Commission to take special account of the short-term public convenience and necessity. It could reasonably conclude in a particular case that the present critical need for natural gas in the interstate market would justify giving advance permission to a producer to terminate service at a future date when the need might be less critical.

The Commission recognized in Order No. 455 that some producers may be unwilling to make an indefinite commitment to the interstate market and that otherwise available supplies were for that reason made unavailable to interstate consumers. The optional certificate procedure is designed in part to attract those supplies to the interstate market by permitting the Commission, in an appropriate case and

when the public interest would thereby be served, to give a producer advance assurance that his commitment will terminate on a date certain. To the extent that such pre-granted abandonment succeeds in attracting otherwise unavailable gas supplies to the interstate market now, it may well advance "the present or future public convenience or necessity" (15 U.S.C. 717f(b)), notwithstanding that the supplies may be available to interstate consumers for a limited rather than unlimited period.

The Commission's willingness to take account of commercial realities does not imply a departure from the statutory public interest standard. Nothing in Order No. 455 supports respondents' assertion that the Commission will authorize a producer to abandon the sale of gas to an interstate purchaser "simply because that producer would rather sell its gas in the unregulated, intrastate market" (APGA Br. in Opp. 5). The producer's desire for advance abandonment authority *triggers* the Commission's consideration of the request, but the decision whether to grant the request turns solely on the Commission's determination of the "present or future public convenience or necessity" under Section 7(b) (Pet. App. 55a).[9]

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[9] See, *e.g.*, *Belco Petroleum Corp.*, 49 FPC 1154, set aside and remanded on other grounds *sub nom. Consumers Union of United States, Inc.* v. *Federal Power Commission*, 510 F. 2d 656 (C.A.D.C.), where the Commission rejected a request for pregranted abandonment under the optional certificate procedure on the ground that the record would not support the necessary findings. The Commission there stated (49 FPC at 1181–1182):

"It is clearly within our power to make a present determination of depletion of supply over time and the require-

It is settled, of course, that the Commission is not required to authorize future termination of service merely because the producer requests such authorization in its application for a certificate. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137. It is also clear that the Commission is not required to approve abandonment of a previously certificated sale merely because the producer would prefer to serve the intrastate market. See *Michigan Consolidated Gas Co.* v. *Federal Power Commission,* 283 F. 2d 204, 214 (C.A.D.C.), certiorari denied *sub nom. Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.,* 364 U.S. 913.

But when an application for a certificate under the optional procedure established by Order No. 455 is conditioned upon advance authorization of future discontinuance—that is, when the producer agrees to serve a particular interstate purchaser for a specified term of years only if it is assured that its commitment may be terminated on a date certain [10]—it is

ments of the present or future public convenience and necessity, given an adequate record. We have no factual basis for exercise of abandonment authority here, however, and Belco's application is therefore denied."

See also *Pennzoil Co.*, 50 FPC 977, 990.

[10] If, for example, a producer discovers and develops a new supply of natural gas and enters into a contract to sell that gas to a specific purchaser commencing at a future date, he may be willing and able to sell the gas in the interim period to another interstate purchaser but only if he is assured that he may discontinue the interim sale at the end of the contract term so that he can fulfill his future contractual obligation to the original purchaser. See, *e.g.*, *Tenneco Oil Co.*, FPC Dkt. No. C175-104 (order issued October 21, 1974).

within the proper scope of the Commission's authority to weigh the public need for the gas during the specified term, and to determine whether that need justifies giving the applicant the advance assurance requested. To deny that the present need for gas is a proper element of the public convenience and necessity in the context of abandonment would be to deprive the Commission of an essential tool for attracting needed incremental gas supplies to the interstate market during the current period of acute shortage, a result that would be at odds with the overriding statutory purposes.

Just as the Commission may, in the exercise of its rate review responsibilities, "employ price functionally in order to achieve relevant regulatory purposes" (*Permian Basin Area Rate Cases,* 390 U.S. 747, 797), including the purpose of enhancing the supply of natural gas available to interstate consumers, so too may it employ its control over abandonment functionally to attract gas to the interstate market. Nothing in the Act forbids a functional approach to abandonment authorizations if, as here, the Commission reasonably finds that such an approach is "necessary or appropriate to carry out the provisions of this Act" (15 U.S.C. 717*o*). See *Permian Basin, supra,* 390 U.S. at 797.

Here, as in other contexts, "the Commission's broad responsibilities * * * demand a generous construction of its statutory authority" (*id.* at 776). Moreover, "[a] presumption of validity * * * attaches to each exercise of the Commission's expertise, and those who would overturn the Commission's judgment undertake

'the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences'" (*id.* at 767). Respondents have not met that burden in this case.

B. THIS COURT'S *SUNRAY* DECISION ESTABLISHES THAT THE COMMISSION MAY PROPERLY AUTHORIZE TERMINATION OF SERVICE AT THE SAME TIME THAT IT CERTIFICATES THE SERVICE

The court of appeals rested its decision in this case in part upon this Court's decision in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137. The court of appeals thought that *Sunray* "fortified" the conclusion that the Commission may authorize a termination of service only at the time of the termination (Pet. App. 21a). As we read *Sunray,* it stands for the opposite proposition: that the Commission, at the time it issues a certificate for the sale of natural gas, has authority simultaneously to approve the future termination of the service.

The *Sunray* decision was the culmination of several rounds of litigation involving the same company. In *Sunray Mid-Continent Oil Co.* v *Federal Power Commission,* 239 F. 2d 97 (C.A. 10), reversed on other grounds, 353 U.S. 944 (hereinafter *Sunray I*), a natural gas producer sought certificates authorizing sales in interstate commerce and requested that the certificates be limited in time to expire coextensively with the terms of the underlying contracts. The Commission issued the certificates but refused to limit them as to time, taking the position that termination of the service could be authorized only in a proceeding initiated under Section 7(b) of the Natural Gas Act and

that the Commission lacked authority to issue a limited-term certificate in a certification proceeding initiated under Section 7(c) (see 14 FPC 877).

The Tenth Circuit held, however, that the Commission's power under Section 7(e) of the Act, 15 U.S.C. 717f(e),[11] to attach reasonable conditions to its certificate authorizations includes the power "in a proper case * * * [to] grant certificates of convenience and necessity for periods of limited duration" (239 F. 2d at 100). Moreover, contrary to the holding of the court of appeals in the present case, the Tenth Circuit concluded that Section 7(b) is no bar to authorizing future termination of service at the same time that the service itself is authorized. "Section 7(b) is clearly not intended to be a restriction upon the powers granted in Section 7(c) and 7(e)" (*id.* at 101).[12]

Subsequently, in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 267 F. 2d 471 (C.A. 10) (*Sunray II*), the same court held that, while the Commission has authority to issue limited-term certificates, it is not required to do so. The Commission may

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[11] The provisions of Section 7(e) are set forth at p. 31, *infra.*

[12] The Tenth Circuit affirmed the Commission's refusal to limit the certificate as to time, however, because the producer's application did not make an adequate showing that such a condition was required by the public convenience and necessity. This Court thereafter reversed solely on the ground that, once the court of appeals had determined that the Commission had authority to issue certificates limited as to time, it should have remanded the case to the Commission rather than deciding itself whether the producer was entitled to such a certificate (353 U.S. 944).

properly issue certificates without limitation as to time, even when the producer's application seeks only a limited-term certificate permitting termination of service at the expiration of the underlying contract.

The decision of the Tenth Circuit in *Sunray II* was affirmed by this Court in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137. This Court stated (364 U.S. at 142):

> If petitioner's contentions, as to the want of authority in the Commission to grant a permanent certificate where one of limited duration has been sought for, were to be sustained, the way would be clear for every independent producer of natural gas to seek certification only for the limited period of its initial contract with the transmission company, and thus automatically be free at a future date, untrammeled by Commission regulation, to reassess whether it desired to continue serving the interstate market.

It was this sentence that the court of appeals in the present case quoted in support of its conclusion that the Commission lacks authority to authorize future abandonment at the time of certification. The court of appeals was correct in thinking that a permanent certificate with pre-granted abandonment is legally and functionally identical to a limited-term certificate. In either case, the Commission determines at the time of certification that the present or future public convenience and necessity, as perceived by the Commission at that time, warrant the issuance of a certificate that permits the future discontinuance of service under it

on a date certain without need for further proceedings. But the court erroneously inferred from this Court's opinion in *Sunray* that a limited-term certificate would be barred by the Act.

Quite the contrary is true. This Court specifically endorsed in its *Sunray II* opinion the Tenth Circuit's holding in *Sunray I* that the Commission was authorized to issue certificates limited as to time. "There is," this Court stated, "no contention that the Commission was again indulging in *the erroneous notion that it had no power to issue a limited certificate*. Cf. *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 239 F. 2d 97, reversed on other grounds, 353 U.S. 944" (364 U.S. at 157; emphasis added).

The court of appeals in the present case thus misread this Court's opinion in *Sunray II*. Far from implying that the Act *forbids* the issuance of a limited-term certificate, the Court expressly adopted the view that the Act *permits* the issuance of such a certificate. Indeed, the holding in *Sunray II* was that the Commission could issue a certificate without a limited term, so long as it did so with recognition that the Act also permits, in a proper case, the issuance of a certificate *with* a limited term.

This Court's decision in *Sunray II* therefore contradicts, rather than fortifies, the court of appeals' conclusion in the present case. It establishes, contrary to the ruling of the court of appeals, that the Commission does have authority to approve the future termination of service on the basis of public interest

considerations as perceived by the Commission at the time of certification.[13]

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it set aside the pre-granted abandonment provision of Order No. 455, and the case should be remanded to that court with directions to enter a judgment of affirmance.

Respectfully submitted.

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AUGUST 1975.

[13] It is no answer to suggest (see APGA Br. in Opp. 2–4) that "long-term" sales should be in a different category. The proposed sale in *Sunray I* was for a primary term of 10 years (239 F. 2d at 98); in *Sunray II* it was for a term of 20 years (364 U.S. at 139). As those decisions demonstrate, the length of the underlying service contract has no bearing on the Commission's authority under Section 7(b) simultaneously to authorize both the initiation and the future termination of a jurisdictional sale, although the length of the term might, in a particular case, influence the Commission's willingness to exercise that authority.

APPENDIX

The Natural Gas Act, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. 717, *et seq.*, provides in pertinent part:

Section 4, 15 U.S.C. 717c:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and

charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but

not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5, 15 U.S.C. 717d:

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any

rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Section 7, 15 U.S.C. 717f:

CONSTRUCTION, EXTENSION, OR ABANDONMENT OF FACILITIES; CERTIFICATE OF CONVENIENCE AND NECESSITY; CONDEMNATION PROCEEDINGS

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it

may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commis-

sion authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner

of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: ***Provided,*** That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Section 16, 15 U.S.C. 717o:

ADMINISTRATIVE POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commis-

sion shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

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IN THE

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OCTOBER TERM, 1975

FEDERAL POWER COMMISSION,
Petitioner

v.

JOHN E. MOSS, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

Before the Court in this review proceeding is a holding by the court of appeals that the Federal Power Commission lacks power to "pregrant" abandonment of service, *Moss* v. *F.P.C.*, 502 F.2d 461 (D.C. Cir. 1974). The opinion below thus set aside in part a statement of policy issued by the Commission in August 1972, *Optional Procedure for Certificating New Producer Sales of Natural Gas*, FPC Order No. 455, 48 F.P.C. 218, *rehearing denied*, 48 F.P.C. 477 (1972), adding Section 2.75 to Title 18 of the Code of Federal Regulations.

STATUTES INVOLVED

Abandonment of interstate natural gas service is governed by Section 7(b) of the Natural Gas Act of 1938, 52 Stat. 824, 15 U.S.C. § 717f(b), which provides:

> "(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

Initiation of interstate natural gas service is governed by Section 7(c)-(e) of the Natural Gas Act, as amended in 1942, 56 Stat. 83-84, 15 U.S.C. § 717f(c)-(e), which provides in pertinent part:

> "(c) No natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . .
>
> "(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.
>
> "(e) . . . a certificate shall be issued to any qualified applicant therefor . . . if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements,

> rules, and regulations of the Commission thereunder, and that the proposed service [or] sale . . . is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. . . ."

QUESTIONS PRESENTED

1. Whether the Federal Power Commission may authorize a natural gas company to abandon service prior to the time the service is even commenced.

2. Whether the Federal Power Commission may authorize an abandonment solely by reference to standards appropriate to initial certification of service and without regard to the public's need for continuation of service as of the time abandonment will be effected.

STATEMENT OF THE CASE

The Commission's Order

In April 1972, the Federal Power Commission gave notice that it was considering the promulgation of an "optional procedure" for regulation of ~~procedures~~ producers (CA App. 1-11 [1]). Premised on the Commission's view that regulation under the Natural Gas Act has the effect of discouraging producer sales in interstate commerce, the proposed "optional procedure" was designed to diminish substantially the impact of regulation on producers electing the new procedure: such producers would be free to charge rates in excess of the applicable area ceilings; they would be free during the term of their contract to increase their rates without a contemporaneous investiga-

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[1] Because petitioner Federal Power Commission has declined to print an Appendix—its motion under Rule 36(8) to dispense with an appendix is presently pending before the Court—references are to the Appendix (and Supplemental Appendix) filed in the court of appeals, a copy of which is before the Court pursuant to Rule 25(1).

tion into the propriety of the increase; and they would be free to abandon service at the end of the contract term.

Because the Commission's proposed "optional procedure" appeared, in each of its major substantive features, to amount to partial deregulation without Congressional sanction, with substantially increased costs for the consumer, the Commission's April 1972 notice elicited an unprecedented number of adverse comments from members of the United States Senate and House of Representatives (see, e.g., CA App. 26-35; CA Supp. App. 24-47, 60-62, 79-91) and from other consumer representatives (see, e.g., CA App. 36-52, CA Supp. App. 1-7). Despite such opposition, however, and without holding any hearings, the Commission, in August 1972, adopted the new "optional procedure" substantially in the form originally proposed, FPC Order No. 455, 48 F.P.C. 218 (CA App. 57-92). Respondents' requests for rehearing (CA App. 93-110, 111-17) were denied on September 8, 1972, FPC Order No. 455-A, 48 F.P.C. 477 (CA App. 124-35), and timely petitions for review were filed with the United States Court of Appeals for the District of Columbia Circuit by respondents John E. Moss *et al.*, a group of twenty-one congressmen,[2] and by respondents American Public Gas Association, American Public Power Association, and Consumer Federation of America.[3]

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[2] The individual respondents are John E. Moss, John D. Dingell, Ogden R. Reid, Bella S. Abzug, Herman Badillo, Jonathan B. Bingham, Phillip Burton, Silvio O. Conte, Charles C. Diggs, Jr., George E. Danielson, Thaddeus J. Dulski, William D. Ford, Seymour Halpern, Robert L. Leggett, Bertram L. Podell, Benjamin S. Rosenthal, Robert O. Tiernan, Lionel Van Deerlin, Charles A. Vanik, Jerome R. Waldie, and Sidney R. Yates. At the time of initiation of review proceedings, each was a duly elected member of the United States House of Representatives.

[3] American Public Gas Association is the national association of municipal gas distribution systems, with over 200 member systems; American Public Power Association is the national association of municipal electric distribution systems, with over 1400 member systems; and Consumer Federation of American is a federation of over 200 local, state, and national organizations representing about 35 million consumer members. The City of Chicago intervened in the court below in support of APGA, *et al.*

The Decision of the Court of Appeals

Although the court of appeals heard argument on the legality of the Commission's "optional procedure" in September 1973, it withheld action pending issuance of this Court's June 1974 opinions in *F.P.C.* v. *Texaco Inc.*, 417 U.S. 380, and *Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 283. With those two decisions in hand, the court of appeals, on August 15, 1974, issued the opinion here under review, *Moss* v. *F.P.C.*, 502 F.2d 461. Written by Judge Robb for a unanimous panel (Judges Tamm, MacKinnon, and Robb), the opinion, while sustaining the Commission's action in major part, reflected the court's considerable difficulty with the Commission's optional procedure.

On the principal issue—the standard to be used to fix prices under the optional procedure—the court noted that "the Rule itself is ambiguous" and was "open to the construction that contract rates will be certified automatically as just and reasonable" (502 F.2d at 466), a construction that under this Court's decision in *Federal Power Commission* v. *Texaco, Inc.*, 417 U.S. 380, would render the rule invalid. The court concluded, however, that it should sustain the rule on the Commission's representation that in reviewing rates under the optional procedure the established standards of Section 4 of the Act—requiring consideration of the seller's costs—would be respected. The court held (502 F.2d at 467):

> "If in weighing the evidence the Commission violates those substantive standards, the aggrieved party will have a remedy in the courts. On the present record, however, we must assume that the Commission will

abide by the standards of the statute and the promises it has made. We cannot condemn the Commission on the theory that it may not do what it has promised to do."

With respect to the Commission's authority to approve rate increases in advance, the court of appeals noted that "any increases initially approved remain subject to review in future proceedings under Section 4(e)" —i.e., a future Commission could determine to suspend the increase and require justification for such increase at the time of its proposed effective date (502 F.2d at 468). And, while declining to prohibit the Commission's endeavor to make an advance determination of the reasonableness of future increases, the court indicated that it was "skeptical about the ability of the Commission to succeed in this endeavor" (*ibid.*).

Despite the court's predisposition to interpret the provisions of the Commission's rule in a manner that would render them lawful under the Natural Gas Act, the court could find no basis whatever for the "pregranted abandonment" provision of Section 2.75(e) of the Commission's Rules. Section 7(b) of the Act prohibits a natural gas company from abandoning service without permission from the Commission, "after due hearing, and a finding by the Commission that the available supply of gas is depleted to the extent that the continuation of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." Under § 2.75(e) the Commission would "pregrant" abandonment authority at the time of initial Section 7(c) certification —some five or ten or twenty years in advance of actual abandonment, and without regard to the continuing need of the public for service. The court noted that "pregranted abandonment requires more clairvoyance than even the Commission's expertise reasonably encompasses" (502 F. 2d at 472), and accordingly held that such procedure

was neither contemplated nor authorized by Section 7 (b).[4]

The Commission petitioned for rehearing and for rehearing *en banc* but, on September 19, 1974, the petitions were denied without a dissenting vote. On June 16, 1975, this Court granted the Commission's petition for certiorari while simultaneously denying (two Justices dissenting) respondent Moss' conditional cross-petition in No. 74-1045.

Use of the Optional Procedure Since Promulgation of the Rule

At the time the Commission promulgated its "optional procedure" in mid-1972, the just-and-reasonable rate ceiling for new sales for most of the major producing areas was in the 24-26¢ per Mcf range, having reached that level as the result of the Commission's acceptance, in 1971, of a 26¢ settlement ceiling in the second Southern Louisiana area rate proceeding.[5] Although the 26¢ ceiling had been fixed some 30-40% higher than the 18.5¢-20¢ levels fixed just two years earlier (and affirmed on appeal) in the first Southern Louisiana proceeding[6] in

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[4] In addition to its rulings on the pricing standard, approval of future rate increases, and pregranted abandonment, the court also sustained a provision of the new rule that permitted an applicant to commence service immediately upon the filing of its application and, if the application had not been disposed of within six months, to charge the contract price free from refund obligation even if the subsequent decision on the merits should conclude that the contract price exceeded the maximum allowable under the optional procedure (502 F.2d at 468-69).

[5] FPC Opinion No. 598, 46 F.P.C. 86 (1971). The 26¢ ceiling fixed in Southern Louisiana II was ultimately affirmed by this Court in June 1974, *Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 283.

[6] FPC Opinion No. 546, 40 F.P.C. 530 (1968), as modified 41 F.P.C. 301 (1969), *aff'd sub nom. Austral Oil Co.* v. *F.P.C.*, 428 F.2d 407 (5th Cir. 1970), *cert. denied*, 400 U.S. 950 (1970).

reliance on the producers' representation that the 26¢ price would stimulate production and dedication of new reserves to the interstate market,[7] the Commission, in its optional procedure rulemaking, concluded that prices *higher* than the recently elevated just and reasonable ceilings were necessary to induce producers to undertake new interstate sales.

Immediately following promulgation of the optional ~~regulation~~ procedure, a number of applications pursuant thereto were filed; most of these called for initial prices in the 35¢-45¢ range and received Commission approval, see, for example, *Belco Petroleum Corp.*, Op. 659, 49 F.P.C. 1154 (1973), *rev'd sub nom., Consumers Union* v. *F.P.C.*, 510 F.2d 656 (D.C. Cir. 1974).

In June 1974, however, the Commission, in a rulemaking proceeding, raised *all* area ceilings to a new nationwide level of 42¢ per Mcf (on rehearing, six months later, the Commission increased this to 50¢ per Mcf)[8]; simultaneously, the Commission announced that it would undertake further upward revision of this escalated ceiling.

While the 45¢ prices approved in 1973 and early 1974 under the optional procedure may have influenced the Commission's conclusion to fix the new "just and reasonable" ceiling in the 42¢-50¢ range, once the Commission had done so, further applications under the optional procedure declined substantially.[9]

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[7] *See* 46 F.P.C. at 127, 164; 417 U.S. at 330-31.

[8] FPC Opinion No. 699 (June 21, 1974), as modified by Opinion No. 699-H (Dec. 4, 1974), *appeals pending sub nom. Shell Oil Co. et al.* v. *F.P.C.*, 5th Cir. Nos. 74-3330 *et al.* To the 50¢ price allowed by Opinion 699-H must be added approximately 7-8¢ in "adjustments" to make the figure comparable to the prior 26¢ ceiling.

[9] The quantum jump in the just and reasonable ceiling from 26¢ to approximately 55¢ with the promise of additional quantum jumps in the near future has, obviously, made the optional procedure less attractive.

This result is shown graphically in a recent report published by the Commission itself, F.P.C. Office of Economics, *Gas Supply Indicators*, First Quarter 1975 (annexed to FPC Release No. 21625, August 8, 1975). That report demonstrates (Charts IX and XI, pp. 26, 28) that after the just and reasonable ceiling was increased from approximately 25¢ to 50¢ in June 1974, sales under the optional procedure, never very substantial in volume notwithstanding their substantial price, declined drastically, accounting for only 1% of total new long-term sales during the first quarter of 1975. The Commission's data further show that new long-term sales *declined* by 40% subsequent to promulgation of the optional procedure in August 1972.[10]

ARGUMENT

The Commission's optional procedure here under review, like its small-producer exemption set aside by this Court in *Federal Power Commission* v. *Texaco Inc.*, 417 U.S. 380 (1974), reflects the Commission's view that regulation of producers under the Natural Gas Act is counterproductive, serving only to discourage new dedications to the interstate market, and that, accordingly, regulation should be made as much like non-regulation as possible.

It is therefore important, at the very outset of this argument, to note that the Commission's policy preference is neither lawful nor efficacious, and is assuredly entitled to no presumption of validity. It is not lawful for the very reasons expounded by Mr. Justice White for a unanimous Court just last year in *Texaco*, *supra*, at 400:

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[10] Chart XI reveals that new long-term sales in the six quarters preceding August 1972 averaged 158 million Mcf per quarter, but in the 10 quarters subsequent to August 1972 averaged only 96 million Mcf per quarter.

> "It may be, as some economists have persuasively argued, that the assumptions of the 1930's about the competitive structure of the natural gas industry, if true then, are no longer true today. It may also be that control of prices in this industry, in a time of shortage, if such there be, is counterproductive to the interests of the consumer in increasing the production of natural gas. It is not the Court's role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process."

It was, of course, with the echo of *Texaco* still in the air that the court below set aside the Commission's pregranted-abandonment theory.

Even aside from its illegality, however, the Commission's inducement-of-supply-by-administrative-deregulation has been tried long enough to be adjudged a failure. Although during the first fifteen years of regulation of producers (1954-69) sales by producers to the interstate market increased from 5.1 trillion cubic feet to 13.2 trillion feet despite the fact that during most of this period prices were held stable at around 17¢ per Mcf, once the Commission, in 1969, adopted new "incentive" policies to avoid impending shortages, the prices escalated, while the anticipated shortage ripened into reality. Thus, interstate sales grew at a far slower rate in 1970 and 1971 than during the previous fifteen years, stopped growing altogether in 1972, and have declined steadily over the past two years. Yet, while this decline in supply was taking place, the average wellhead price, under the Commission's various "incentive" policies, has increased from 17.5¢ per Mcf in mid-1969 to 23¢ in September

1973 (immediately prior to the Arab oil embargo) to approximately 35¢ today.[11]

I. The Federal Power Commission Lacks Statutory Authority To "Pregrant" Abandonment of Service at a Time When It Cannot Evaluate the Public's Need for Continuation of the Service Being Abandoned.

A. *In Determining Whether Abandonment Can Be Authorized Under Section 7(b), the Primary Consideration Is the Public's Need for Continuance of the Service To Be Abandoned.*

The abandonment provision of the Natural Gas Act—Section 7(b)—was part of the original Act, and has continued unchanged throughout the Act's 37-year history. The Section prohibits abandonment of service without prior FPC approval; it requires a hearing before approval can be granted; and it specifies two, and only two, grounds for Commission approval: (1) "that the available supply of natural gas is depleted to the extent that the continuation of service is unwarranted," and (2) "that the present or future public convenience or necessity permit such abandonment."

The Commission, making no claim that "pregranted abandonment" can be predicated on the first ground, rests its entire case for pregranted abandonment on the second ground. Both the statutory language and the cases decided under it defeat the Commission's claim.

The leading case on the criteria for abandonment under Section 7(b) is *Michigan Consolidated Gas Co.* v. *F.P.C.*, 108 U.S. App. D.C. 409, 283 F.2d 204, *cert. denied sub nom., Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 364 U.S. 913 (1960), a case mentioned, but not discussed, by the Commission (see

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[11] 34.71¢ per Mcf as of May 1975, the latest period for which figures are available, FPC Release No. 21674 (Aug. 25, 1975).

FPC Br. 18). In that case, the court set aside an FPC order authorizing Panhandle Eastern Pipe Line Company to abandon service to the Detroit area. Speaking for a unanimous panel that included Chief Justice (then Judge) Burger, Judge Bazelon examined the purport of the statutory language in Section 7(b) (283 F.2d at 214):

> "The fact that abandonment of public service requires Government approval symbolizes the special legal status and obligations of common carriers and public utilities. This includes an obligation, deeply embedded in the law, to continue service. When Panhandle sought and obtained a certificate of public convenience and necessity to serve the Detroit market, it became the exclusive supplier for that market. If it wants to abandon service because it must now share that market, or because it prefers to use that gas for more profitable unregulated sales, or because it wants to be rid of what it considers a vexatious servitude, these are not reasons for granting its request. Abandonment may be allowed only if 'the public convenience or necessity permit.' And the word 'permit,' instead of 'require,' does not shift the burden to those opposing the application. An applicant for abandonment under § 7(b) of the Act has the burden of making the factual showing which will assure the Commission, charged with protecting the public interest, that that interest will in no way be disserved; just as the applicant under § 7(c) for a certificate to commence service must bear the burden of proving that that public interest will be served."

The next major discussion of Section 7(b) was in this Court's decision in *Sunray Oil Co.* v. *F.P.C.*, 364 U.S. 137 (1960), a case that directly involved initial certification under Section 7(c) rather than an abandonment application under Section 7(b). In sustaining the Commission's power to grant a certificate of unlimited duration rather than a certificate limited, as requested by the applicant, to the 20-year term of the underlying contract, the Court laid heavy emphasis on the intent of Section 7(b). Thus, the Court noted that if a limited-term certificate were granted,

> "at the end of the period, petitioner would become free to cease supplying gas to the interstate market . . . without further leave of the Commission, and without there having been made the findings that Congress deemed necessary.
>
> "If petitioner's contentions . . . were to be sustained, the way would be clear for every independent producer of natural gas to . . . automatically be free at a future date, untrammeled by Commission regulation, to reassess whether it desired to continue serving the interstate market.
>
> ". . . If an individual producer were thus left free to discontinue his supply, the transmission company would be forced to find a supplier of gas elsewhere, and make connection with him, to continue its service; and the consumer ultimately would pay the bill for the rearrangement." (364 U.S. at 142-43, ~~emphasis supplied~~.)

This Court explicitly noted its concern with an interpretation of the Act that might result in permitting "an advance license for the abandonment of the continued supply of gas," 364 U.S. at 147, and it spoke disapprovingly of arrangements that would give sellers "power to abandon service, at a contract's termination, without *contemporaneous* Commission approval" (*ibid.*, emphasis supplied).

Six years after *Sunray*, the Court again addressed itself to the statutory purpose intended by Section 7(b). Speaking for a unanimous Court in *United Gas Pipe Line Co.* v. *F.P.C.*, 385 U.S. 83 at 88 (1966) (emphasis supplied), Mr. Justice White specifically relied on the

Commission's "regulatory responsibility to assure that gas once dedicated to the interstate market will continue to be available to that market *so long as the public interest demands*" as sufficient basis for requiring the pipeline *purchaser* to continue taking deliveries from a producer after expiration of the contract term.

Finally, in *Transcontinental Gas Pipe Line Corp.* v. *F.P.C.*, 488 F.2d 1325 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974), the Court reaffirmed that, in determining whether abandonment should be permitted under Section 7(b), the Commission must give primary weight to the public's need for continuation of the service proposed to be abandoned, and held that the Commission had "erred in according dispositive weight to private, albeit Commission approved, contractual arrangements," 488 F.2d at 1328-29.

B. *The Commission's "Pregranted Abandonment" Proposal Fails To Meet the Statutory Requirements.*

As the cases discussed *supra* make clear, abandonment of service (except for depletion of supply) is to be permitted only on a finding by the Commission made contemporaneously with the proposed abandonment that the public no longer has a need for continuation of the service to be abandoned. What the Commission proposed in its rule set aside by the court of appeals was not merely a drastic shift in the *timing* of the grant of abandonment—from contemporaneous with abandonment to contemporaneous with initiation of service—but, in consequence, a drastic shift in the *standard* to be employed for determining whether to permit abandonment. Instead of focusing upon the public's need for continuance of service at the time of proposed abandonment [12]—a

[12] The Commission's suggestion (Br. 16) that, by the time of discontinuance, the gas shortage "might be less critical" is not merely a *post hoc* rationalization of counsel unsupported by anything in the record but is precisely the type of ouija-board clairvoyance rightly condemned by the court below. The suggestion is, moreover, not merely *post hoc*, but *ad hoc* as well: heretofore, the Commission has consistently asserted that the gas supply situation will deteriorate over time.

consideration that cannot be meaningfully weighed ten or twenty years in advance and which the statute wisely does not require be made years in advance [13]—the Commission intends to pregrant abandonment at the time of proposed initial certification of service on the grounds (1) that the public needs the gas and (2) that the producer "may be unwilling to make an indefinite commitment to the interstate market" (FPC Br. 16-17).

Since, however, proof of the public's need for *initiation* of service is a prerequisite for certification under Section 7(c), *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9 at 51-52 (1968), acceptance of the Commission's position would result in the elimination of Section 7(b) as a separate and additional protection to the public.

Both the language and the structure of the Act indicate that the Commission has erred both with respect to timing and with respect to the governing standard.

To begin with, it should be noted that the abandonment provision (Section 7(b)) was part of the original

[13] The Commission's contention (FPC Br. 13-15) that, because in some instances agency decisions must (and hence lawfully may) be based on estimates as to the future, an agency may rely on its estimates of the distant future even when there is no compelling reason not to defer the determination to a date nearer the event in question, is at best a *non sequitur*, at worst disingenuous. It is a *non sequitur* because the reason for permitting reliance on forecasts of the future—the necessity for doing so, and the inability to delay decision—is not present here. It is disingenuous because in pregranting abandonment the Commission does not intend to undertake (assuming it meaningfully could) the advance determination of the public's need for continuation of the service to be abandoned; rather the standard will be, as the Commission concedes (Br. 16-17), whether the seller would refuse to sell gas needed now unless abandonment authority is pregranted.

Natural Gas Act of 1938, 52 Stat. 821; the certificate sections (7(c), (d), and (e)) did not come into the Act until 1942, 56 Stat. 83. Thus, from 1938 to 1942, service could be commenced without Commission approval, but once commenced could not be abandoned. And, from the beginning, Section 7(b) authorized a "natural-gas company"—i.e., one who, under Section 2 (6), is presently "engaged in . . . the sale . . . of gas"—to seek permission to terminate the sale; in this respect, the different language in Section 7(c)—a "natural-gas company *or person which will be a natural-gas company*"—is instructive.

Further, all of the operative language of Section 7(b) is in the present tense: under the first clause, the finding must be that the "supply of natural gas *is* depleted to the extent that continuance of service *is* unwarranted." Clearly, such a finding requires a hearing at the time of proposed abandonment, when depletion has already occurred. The language calling for obtaining Commission approval, "after due hearing and a finding by the Commission" applies to both statutory grounds, depletion of supply and public convenience and necessity, and there is no basis for concluding that the identical language can refer only to a contemporaneous hearing and finding with respect to depletion but can permit a years-in-advance hearing and finding with respect to public convenience and necessity. Moreover, the second ground, too, is phrased in the present tense—"permit", not "will permit". Significantly, in the portion of the rule set aside by the court below, the Commission did not talk about permitting or approving abandonment, which is what Section 7(b) is all about, but rather the Commission spoke of "pregranting" abandonment authorization—i.e., tying the hands of a future Commission by depriving it of the right to determine whether an existing service should be abandoned. "Pregrant" of authority is alien

to this statute, however, and the Commission fails to cite any precedent in its 37-year history for its novel interpretation of Section 7(b).

The structure of the Act, as well as its language, compels the conclusion that the Commission seeks to use the wrong standard for abandonment. The public's need for new service is the standard for granting initial service under Section 7(c). If that same standard, at the same initial certificate proceeding, can (by the expedient of the producer's statement that he will not sell his gas to the interstate market without pregranted abandonment) also become the standard for abandonment of service at the end of the contract term, then Section 7(b) has been effectively read out of the Act.

Under the logical statutory scheme of Section 7 of the Natural Gas Act, whether a certificate to commence a sale should be granted is determined under Sections 7 (c) and (e) by the facts and circumstances existing at the time the sale is to begin. Similarly, whether authorization to abandon a sale should be granted is determined under Section 7(b) by the facts and circumstances existing at the time the sale is to terminate. The concept of pregranted abandonment, therefore, is contrary to the language and spirit of Section 7 of the Act.

The legal basis for the Commission's thesis, that pregranted abandonment offers an added inducement to the producer to sell to the interstate market, has, as noted *supra* pp. ~~11-12~~ 9-10, been rejected by this Court's *Texaco* decision: if regulation under the Natural Gas Act has the effect of discouraging dedications to the interstate market, the remedy lies with Congress, not with administrative attempts at partial deregulation. There is, moreover, little if any factual basis for the Commission's thesis. There is no evidence in the present record to support the premise; and indeed the Commission points

to no evidence outside the record. And to the extent that added inducement is required to entice gas away from the intrastate market, it surely cannot apply to gas sold from offshore federal leases, which can only be sold in interstate commerce.[14] Yet the bulk of "optional procedure" cases have involved federal domain gas! Even *amicus* Interstate Natural Gas Association recognizes (Amicus Br. 3 n. 4) that the incentives of the optional procedure are not required for offshore gas.

To the extent that the unregulated intrastate market is siphoning off gas supplies needed by interstate users, the solution would appear to lie primarily with Congress, and not with a Commission attempt to have the regulated interstate market emulate the unregulated market. If the two markets are to be brought into conformity, however, without further legislation, it would appear that the appropriate procedure would be for the Federal Power Commission to protect the interstate market from undue discrimination by allocating supply between the interstate and intrastate markets on the basis of articulated and defensible national priorities under this Court's holdings in *Houston East & West Ry Co.* v. *U.S.*, 234 U.S. 342 (1914), and *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621 at 632-35 (1972), and under the authority of the Commerce Clause of Article I, Sec. 8 of the United States Constitution, the Supremacy Clause of Article VI, para. 2 of the United States Constitution and Section 4(b) of the Natural Gas Act, 15 U.S.C. § 717c(b).

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[14] The Commission has recently recognized as much. In Order No. 533 (adding new Section 2.79 to 18 C.F.R., Aug. 28, 1975), promulgating yet another rule to attract intrastate gas to the interstate market, the Commission stated, mimeo. p. 21:

> "Moreover, one of the main goals of our policy is to increase supplies available to the interstate market from the unregulated intrastate market. Since gas produced in the off-shore federal domain is already available to the interstate market, we feel it is unnecessary to include the off-shore federal domain within the scope of this policy to achieve our goal."

II. The Commission's Brief on the Merits Raises No Issue Warranting Supreme Court Review.

The brief on the merits filed by the Federal Power Commission, when coupled with information that has only recently become available, reveals far more clearly than did the Commission's petition for certiorari that the decision of the court of appeals, if left undisturbed, would have no adverse impact on any significant Commission policy or program.

The facts are now clear. Particularly since the doubling of just and reasonable ceilings by Opinion Nos. 699 and 699-H, the optional procedure—with or without pregranted abandonment—has been little used. There has been no showing that restoration of pregranted abandonment authority would result in the dedication of additional supplies to the interstate market. There is little evidence that the Commission itself knows what circumstances would warrant pregranted abandonment;[15] in any event, it apparently has not, at least during the three years that this appeal has been pending, actually attempted to pregrant abandonment authority under Section 2.75. And while the Commission's membership has been changing rapidly, at least one of the new Commissioners has serious reservations about the wisdom of any form of short-term sale, see, e.g., *Matter of Barton*, 51 F.P.C. 1169 at 1171 (1974). Finally, the Commission has failed to show any basis for the optional procedure, and *a fortiori* for pregranted abandonment, in the crucial federal offshore area.

Under these circumstances, respondents would respectfully suggest that the writ of certiorari in this proceeding be vacated as improvidently granted.

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[15] The one example cited by Commission counsel (FPC Br. 18 n. 10) could be the subject of a far narrower regulation than the overbroad one set aside by the court below.

CONCLUSION

The writ of certiorari heretofore granted should be vacated as improvidently granted. In the alternative, the judgment of the court of appeals insofar as it set aside the pregranted abandonment provision of the optional procedure should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-883

FEDERAL POWER COMMISSION, *Petitioner*
v.
JOHN E. MOSS, ET AL., *Respondents*

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, AMICUS CURIAE, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, AMICUS CURIAE, IN SUPPORT OF PETITIONER

The Interstate Natural Gas Association of America (INGAA) respectfully moves for leave to file the attached brief *amicus curiae* in this case. As indicated by letters contemporaneously filed herewith, INGAA has obtained the consent of the petitioner, Federal Power Commission, as well as the following parties to the proceeding in the court below: petitioners Amoco Production Company, American Public Gas Associations, American Public Power Association and Consumer Federation of America, and intervenors Mobil Oil Corporation, Consumers Union of United States,

Inc., Continental Oil Company, Associated Gas Distributors and the Public Service Commission for the State of New York. John E. Moss, et al., respondents herein, have declined to consent. INGAA has been unable through telephonic or postal means to make contact with or to obtain consent or denial from Hamilton Treadway, Esq., who participated as *amicus curiae* in the proceeding in the court below.

INGAA is a non-profit association. Its members include most of the natural gas transmission companies subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act, 15 U.S.C. §717, *et seq.* Their operations account for more than 90% of the gas transported and sold annually in interstate commerce in the United States.

INGAA has participated in the past as an intervenor or *amicus curiae* before this Court and various United States Courts of Appeals. It undertakes to participate in cases which directly and significantly affect the interests and operations of its membership and which have substantial industry-wide consequences. This is such a case.

INGAA is deeply concerned that the decision below if affirmed could eliminate a significant source of natural gas for the interstate market which the pipeline companies urgently need in order to minimize curtailments in service to their customers, a problem which has assumed grave national proportions.

Because of the critical shortfall in natural gas supplies which this Court has judicially noticed [1] and the existing regulatory constraints on developing new sup-

[1] *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 626 (1972).

plies for interstate pipelines, the interstate lines have found it increasingly difficult to satisfy the requirements of their customers, resulting in industrial plant closures in many sections of the country with resultant unemployment and general economic dislocation. In the recent past the largest portion of new gas coming into the interstate market has been gas purchased pursuant to the optional procedure which is the subject of review here i.e., pre-granted abandonment, or pursuant to limited term and temporary purchase provisions of the Federal Power Commission's Regulations under the Natural Gas Act.[2] INGAA concurs with the decision of the court below to the extent it upholds the Commissions existing optional pricing procedure, but opposes that decision to the extent it would disallow pre-granted abandonment authorization. The decision of the court below has cast a serious cloud on the continued viability of these pre-granted abandonment provisions to the point that very little new gas onshore is being made available to the interstate buyers.[3] This creates an intolerable situation for the interstate pipelines and the millions of consumers through-

[2] 18 CFR 2.70. In 1973, e.g., the last full year for which data are presently available, sixty-four percent (64%) of all gas committed to interstate commerce was in accordance with the pre-granted abandonment or temporary sales provisions. See testimony of Hon. John S. Nassikas, Chairman, Federal Power Commission, Hearings before Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, June 11, 1974.

[3] Since the wellhead price of gas in the intrastate market is not subject to controls the bulk of new onshore gas has been diverted away from the interstate market to intrastate buyers. Natural gas produced on the Outer Continental Shelf (offshore) on Federal Lands is required by law to be sold in interstate commerce. See Outer Continental Shelf Lands Act, Sec. 5, 43 USC 1334(c).

out this nation who are dependent on these pipelines for their natural gas supplies.

Because of the overriding public interest in having the important policy questions raised in the instant petition decided by this Court and the great impact the Court's ruling here could have on the interstate pipeline industry and the public it serves, INGAA believes it appropriate to submit this *amicus curiae* brief in support of Petitioner.

INGAA, therefore, respectfully requests leave to file such brief *amicus curiae* in support of Petitioner.

Respectfully submitted,

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February 20, 1975

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-883

FEDERAL POWER COMMISSION, *Petitioner*
v.
JOHN E. MOSS, ET AL., *Respondents*

AMICUS CURIAE BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

The Interstate Natural Gas Association of America (INGAA) respectfully submits this brief as *amicus curiae* in support of Petitioner Federal Power Commission. It is INGAA's position that the decision of the court below, insofar as it declared unlawful the pre-granted abandonment provision of Commission Order No. 455, is directly in conflict not only with past decisions of this Court but also with decisions of the Tenth Circuit Court of Appeals which held, contrary to the D. C. Circuit's ruling, that the Commission has the power under the Natural Gas Act (Act) (15 USC 717f(b)) to grant limited-term certificates of public

convenience and necessity. The decision below in this respect is in error and should be reversed. INGAA's interest is set forth in its Motion For Leave to File *Amicus Curiae* Brief.

ARGUMENT

Background

Recognizing the urgent need to bridge the widening gap between existing demands for natural gas and available supplies, the Federal Power Commission (Commission or FPC), by Order Nos. 455 and 455A (issued August 3, 1972, and September 8, 1972, respectively) enacted an Optional Pricing procedure for certificating new producer sales of natural gas. An integral part of the new procedure was the Commission's determination that upon a proper showing by applicants therefor, it would grant limited term certificates of public convenience and necessity, i.e., automatically terminable at the end of the period of time covered by the certificate, without the grantee having to go through the abandonment procedures prescribed by Section 7(b) of the Act (15 USC 717f(b)). The new procedure, the Commission found, was an attempt to lessen the rate uncertainty which had prevailed throughout 18 years of producer regulation and to encourage producers to commit gas to the interstate market. Such rate uncertainty, the Commission determined, not only prevented the producer from knowing how much he could lawfully charge[1] but seriously

[1] The history of producer price regulation by the Commission is replete with price rollbacks and other limitations, as well as lengthy drawn-out proceedings which have taken years to complete. See *Mobil Oil Corp.* v. *FPC*, —— U.S. —— 41 L.Ed. 2d 72, 94 S.Ct. —— (Decided June 10, 1974).

impeded domestic exploration and development for natural gas reserves and discouraged producers from committing gas to interstate pipelines. The Commission further recognized that in the absence of a regulatory mechanism designed to attract new dedications of natural gas reserves to the interstate market, the American consumer would not only have less natural gas available but would be forced to rely more heavily on substitute or supplemental supplies. These substitutes will be available to consumers, the Commission determined, only at costs significantly higher than the prices of currently available domestic wellhead supplies. Thus, the Commission concluded, the new gas supplies developed under the optional procedure, albeit at higher prices, would still result in a cheaper mix of energy supplies for consumers than the alternative of heavier reliance on substitute or supplemental supplies. In any event, these substitutes will not generally be available until the late 1970's or early 1980's.[2]

The Holding of The Court Below

On August 15, 1974, the D. C. Circuit rendered its decision upholding the Commission's orders in all respects except one. The court concluded that the pre-granted abandonment proviso (18 CFR 2.75(e)) violated Sec. 7(b) of the Natural Gas Act (15 USC 717f(b) *et seq.*) and must be set aside. The court determined that pre-granted abandonment "would leave a producer free to discontinue service to the interstate market perhaps years after the original certification with no contemporaneous obligation on the producer to justify withdrawal of services consistent with the

[2] See A Realistic View of U.S. Natural Gas Supply, FPC Staff Report, issued December 1974, p. 1.

public convenience and necessity." The court rejected the Commission's assertion that when a pre-granted application is before it for approval, it (the Commission) "may make the necessary findings required by Sec. 7(b) of the Act." This, the court said, entails "more clairvoyance than even the Commission's expertise reasonably encompasses." Moreover, the court found that pre-granted abandonment will not be subject to future review but instead "will be completely untrammeled." 502 F.2d 461, 472. The D.C. court denied the Commission's Petition for Rehearing *per curiam,* on September 19, 1974.

The Decision Below is in Error and Should Be Reversed

The D. C. Circuit erred in finding that pre-granted abandonment violated Sec. 7(b) of the Act. Insofar as the court's opinion sets aside Sec. 2.75(e) of the optional procedure, it is in direct conflict with two opinions of the Tenth Circuit and with decisions of this Court. In *Sunray Mid-Continent Oil Company* v. *FPC,* 239 F.2d 97 (Sunray I), reversed on other grounds, 353 U.S. 944, the Tenth Circuit squarely held that under Sections 7(c) and 7(e) of the Act (15 USC 717(c), (e)) the Commission in a proper case "may grant certificates of convenience and necessity for periods of limited duration." (Id. p. 100). This Court reversed the Tenth Circuit not upon the merits of the case but for the reason that the jurisdiction of the Court of Appeals was exhausted when it held that the Commission had authority to issue certificates of limited duration, and therefore no power remained to determine whether the applicant was entitled to such a limited certificate (353 U.S. 944, 945). Two years later, Sunray challenged another order in which the Commission denied the producer's request for a certificate tied to the terms of the underlying obligations of the parties' contract. Once again the Tenth Circuit affirmed the Commission but also *again* held that under Secs. 7(c) and 7(e) the FPC has the authority to issue certificates of limited duration under proper circumstances, *Sunray Mid-Continent Oil Co.* v. *FPC,* 267 F.2d 471 (Sunray II). On review this Court affirmed the Tenth Circuit's opinion in Sunray II (*Sunray Mid-Continental Oil Co.* v. *FPC,* 364 U.S. 137). The thrust of this Court's opinion in that case is set forth fully in the Petition for Writ of Certiorari and need not be repeated here. Suffice it to state that it demonstrates without question the error of the court below in setting aside pre-granted abandonment. This view is fortified by the Court's decision in *Sun Oil Co.* v. *FPC,* 364 U.S. 170, a companion case to *Sunray II* and issued simultaneously with *Sunray II.* While these decisions dealt with the question of the Commission's authority to issue permanent, unlimited certificates, the Court left no doubt as to the Commission's authority under proper circumstances to issue limited term certificates. In this respect the D. C. Circuit completely misconstrued this Court's holdings. Thus unless the Court grants the Commission's Petition and affirmatively resolves this conflict, considerable confusion could arise as to the extent of the Commission's authority to grant limited term certificates. Failure of this Court to act will exacerbate the already difficult task confronting interstate pipelines of acquiring new supplies of gas. For all practical purposes, long-term dedications of natural gas reserves to interstate lines are not presently available and the majority of purchases today are on a limited term or temporary basis pursuant to Sec. 2.70 of the Commissions' Regulations (18 CFR

2.70). Indeed, as stated in INGAA's Motion, in 1973, the last full year for which data are available, sixty-four percent (64%) of all gas purchased by interstate pipelines was under limited-term and temporary emergency authority.[3] While the D. C. Circuit's decision is not directed to Sec. 2.70 of the Commission's Regulations, it has nonetheless raised doubt as to the pre-granted abandonment aspects of that rule. It would be extremely unfortunate and portend grave consequences for the millions of consumers of natural gas in this country if this source of supply, limited though it may be, were to be effectively excluded from the interstate market. The critical supply shortage facing the Nation today behooves the Commission, the Courts, industry and all interested parties to take all reasonable steps to develop new reserves of this vital premium fuel. The Commission's orders below, including the provision for pre-granted abandonment were consistent with this objective and the Commission's innovative effort should be affirmed. The Commission's Petition therefore raises an important policy question of national significance which should be resolved by this Court.

[3] Of 1,237,000,000 Mcf of natural gas sales committed to the interstate market in calendar year 1973, approximately 790,000,000 Mcf were committed pursuant to limited-term procedures. While these volumes may appear small, they nonetheless contributed to the interstate pipelines' ability to meet peak winter season demands. See page 3 of INGAA's Motion herein, footnote 2.

CONCLUSION

The Commission's Petition For Writ of Certiorari should be granted. For the reasons stated the judgment of the lower court should be reversed insofar as it declared unlawful and set aside Section 2.75(e) of the Commission's rule, and the action of the Commission in adopting same should be affirmed.

Respectfully submitted,

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Attorney for Interstate Natural Gas Association of America

February 20, 1975

Certificate of Service

I certify that I have this day served the foregoing Motion for Leave to File Amicus Curiae Brief and Brief of the Interstate Natural Gas Association of America, Amicus Curiae, in Support of Petitioners, on all parties to the proceedings in accordance with the requirements of this Court's Rule 33.

DATED at Washington, D. C. this 20th day of February, 1975.

/s/ JEROME J. MCGRATH
Jerome J. McGrath

Supreme Court, U. S.
FILED
JUL 31 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-883

FEDERAL POWER COMMISSION, *Petitioner*

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On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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Amicus Curiae Brief of The Interstate Natural Gas Association of America in Support of Petitioner

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---

Amicus Curiae Brief of The Interstate Natural Gas Association of America in Support of Petitioner

---

The Interstate Natural Gas Association of America (INGAA), having obtained the consent of all parties as required by this Court's Rule 42, submits this brief as *amicus curiae* in support of the Petitioner.

THE AMICUS

INGAA is a non-profit association. Its members include most of the major natural gas transmission companies subject to the jurisdiction of the Federal Power Commission (FPC) under the Natural Gas Act, 15 U.S.C. § 717 *et seq.* (Act) Their operations account for more than 90% of the natural gas transported and sold annually in interstate commerce in the United

States. INGAA has participated as an intervenor or *amicus curiae* before this Court and various United States Courts of Appeal in matters arising out of or related to FPC decisions. It also undertakes to participate in regulatory and other judicial proceedings which are of substantial, industry-wide significance. This is such a case.

THE INTEREST OF AMICUS

INGAA is deeply concerned that the decision below,[1] as it relates to pregranted abandonment could, if affirmed, eliminate a significant source of natural gas for the interstate market which the pipeline companies urgently need in order to minimize curtailments in service to their customers, a problem which has assumed grave national proportions.

Because of the critical shortfall in natural gas supplies which this Court has judicially noticed[2] and the existing regulatory constraints on developing new supplies for interstate pipelines, the interstate lines have found it increasingly difficult to satisfy the requirements of their customers, resulting in industrial plant closures in many sections of the country with resultant unemployment and general economic dislocation. In the recent past a significant portion of new gas coming into the interstate market has been gas purchased pursuant to the optional procedure or limited-term and temporary purchase provisions of the Federal Power Commission's Regulations under the Natural Gas Act.[3]

[1] *John E. Moss, et al.* v. *Federal Power Commission*, 502 F.2d 461.

[2] *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 626 (1972).

[3] 18 CFR 2.70. See Statement of Hon. John N. Nassikas, Chairman, Federal Power Commission, Hearings before Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, July 14, 1975, pp. 5-6.

These procedures, either expressed or implied, all involve pre-granted abandonment. It is the pre-granted abandonment portion of the lower court's optional pricing decision that is presently before this Court.

While the interstate pipelines have long advocated long term commitments of gas reserves to their systems, suppressive wellhead price regulation by the Commission has virtually dried up such long-term contracts, particularly in onshore areas where competition from non-regulated intrastate sales has dominated the market place. Thus, today short-term sales are the rule rather than the exception. Unless and until Congress acts to relieve this situation, there is little hope that it will change materially. The pre-granted abandonment provision of the Commission's optional pricing procedure, which the court below declared unlawful, has been one of the main features of this effort to get new gas committed to the interstate market.

INGAA concurs with the decision of the court below to the extent it upholds the Commission's existing optional pricing procedure, but opposes that decision to the extent it would disallow pre-granted abandonment. The decision of the court below has cast a serious cloud on the continued viability of these pre-granted abandonment provisions. The fact is, little new gas onshore is being made available to the interstate buyers.[4] This creates an intolerable situation for the interstate pipelines and the millions of consumers throughout this nation who are dependent on these pipelines for their

[4] Since the wellhead price of gas in the intrastate market is not subject to controls the bulk of new onshore gas has been diverted away from the interstate market to intrastate buyers. Natural gas produced on the Outer Continental Shelf (offshore) on Federal Lands is required by law to be sold in interstate commerce. See Outer Continental Shelf Lands Act, 43 U.S.C. 1334(c).

natural gas supplies. Furthermore, in a recent gas curtailment report by the FPC Staff, it was projected that curtailments of natural gas for the April 1975 through March 1976 period would be 45% higher than they were during the preceeding twelve months.[5] Consequently, if the lower court's ruling on pre-granted abandonment is sustained, the percentage of curtailments projected by the FPC Staff Report could be even greater.

This case presents a question of overriding public importance. INGAA supports the position of Petitioner that it has the authority under the Natural Gas Act to authorize pre-granted abandoment under proper circumstances and that its action below was a proper exercise of such authority.

ARGUMENT

I

As stated above, it is INGAA's position that the Commission has the authority under the Natural Gas Act to issue certificates for a limited duration, which by their very nature terminate at the end of the certificate period unless otherwise conditioned. In substantiation of this position we rely on this Court's decision in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137, affirming 267 F.2d 471 (*Sunray II*), and this Court's decision in *Sun Oil Co.* v. *Federal Power Commission,* 364 U.S. 170, (*Sun*), a companion case to *Sunray II,* issued simultaneously with that decision. Actually, the question first arose in a Tenth Circuit decision involving Sunray, which was reversed by this Court on other grounds.[6]

---

[5] FPC Staff Gas Curtailment Report, Federal Power Commission Release No. 21454, June 6, 1975.

[6] *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 239 F.2d 97 (CA 10), rev'd. on other grounds 353 U.S. 944 (*Sunray I*).

These decisions dealt with the question of the Commission's authority to issue permanent, unlimited certificates, but the Court left no doubt as to the Commission's authority under proper circumstances to issue limited-term certificates. The D. C. Circuit completely misconstrued this Court's holdings as well as the Tenth Circuit's conclusions in *Sunray I.*

In *Sunray I,* a natural gas producer sought a certificate which would end coterminously with the underlying contracts for the sale of the gas. The Commission refused to allow the certificates to be limited, and stated that:

> We have consistently held that cessation of service may be authorized only in a proceeding initiated under Section 7(b) of the Natural Gas Act. (Sunray Oil Corp., 14 FPC 877)

However, on appeal, the Tenth Circuit held that the Commission could, "in a proper case . . . grant certificates of convenience and necessity for periods of limited duration" (*Sunray I* 239 F.2d at 100). This authority, the Tenth Circuit held, arises out of the provisions of Section 7(e) of the Act empowering the Commission "to attach . . . such reasonable terms and conditions as the public convenience and necessity may require." (15 U.S.C. 717f(e))

Subsequently, in *Sunray II,* the Tenth Circuit held that the Commission has authority to issue not only certificates for a limited-term, but also certificates without a time limitation even when the producer applicant had applied for a certificate of limited duration. This Court affirmed the Tenth Circuit's *Sunray II* decision (*supra*) and also endorsed that Circuit's decision in *Sunray I,* that the Commission could

issue certificates of limited-term under proper circumstances.

In the *Sun* case, affirming the Commission's issuance of a permanent rather than a term certificate to Sun, the Court in the course of its decision said:

> Of course, if, despite its authority to grant a permanent certificate, the Commission had in 1956 *actually granted a term certificate to petitioner, petitioner would after the term have been free to apply for a new certificate to authorize the sale under the new contract* (364 U.S. at 174) (Emphasis supplied).

Citing *Sunray I,* the Court went on to note that:

> " . . . the batch of certificates containing petitioner's was issued at a time when the Commission was asserting that it lacked even the power to issue a term certificate . . . It was not until October 29, 1956, that judicial rejection of the Commission's position occurred." *Id.* (Footnote omitted)

It is clear, therefore, that this Court has long recognized the authority of the Commission to issue limited-term certificates under proper circumstances which necessarily entail pre-granted abandonment. We submit, therefore, that the D. C. Circuit erroneously interpreted this Court's ruling in *Sunray II* to the extent of finding that *Sunray II* stands for the proposition that the Commission does not have authority under the optional pricing procedure to allow pre-granted abandonment.[7] The Court's order in these respects should be reversed and the Commission's action affirmed.

---

[7] The D.C. Circuit seemingly ignored *Sun* since no reference at all is made to this case in its decision.

II

Although not involved here, the lower court's decision relative to pre-granted abandonment has cast a shadow over the limited-term and emergency purchase procedures under Sec. 2.70 of the Commission's Regulations even though such procedures relate to shorter term sales than those contemplated by the optional procedures of Sec. 2.75(e). It is important, therefore, that the Court remove whatever uncertainty may exist by affirming Petitioner's interpretation of its authority under the Act to approve future termination of service. Without these special procedures, the curtailments on the interstate pipeline systems will be even greater than presently estimated with concommitant economic and social ill effects on both the pipeline systems and the ultimate consumer. From 1971 through the first quarter of 1975, a considerable amount of all gas purchased by interstate pipelines was under the optional pricing, limited-term and temporary emergency procedures.[8] Thus, the shadow created by the D. C. Circuit's decision in the instant case over the Sec. 2.70 procedures relative to pre-granted abandonment, portends grave consequences for millions of consumers if as a result a barrier is erected to emergency and limited-term sales of gas by producers to interstate pipelines.

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[8] Of the approximately 2.1 Tcf of natural gas sales committed to the interstate market from 1973, through the first quarter of 1975, 982 Bcf were committed pursuant to optional, limited-term, and emergency procedures. These volumes have contributed mightily to the interstate pipelines' ability to meet peak winter season demands. See Statement of Hon. John N. Nassikas, Chairman, Federal Power Commission, Hearings before the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, July 14, 1975, p. 6.

The critical supply shortage facing the Nation today behooves the Commission, the Courts, industry and all interested parties to take all reasonable steps to develop new reserves of this vital premium fuel. The Commission's orders below, including the provision for pre-granted abandonment, were consistent with this objective and within its authority to prescribe.

CONCLUSION

For the reasons stated the judgment of the lower court should be reversed insofar as it declared unlawful and set aside Section 2.75(e) of the Commission's Regulations (18 CFR 2.75(e)), and the action of the Commission in adopting same should be affirmed.

Respectfully submitted,

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Attorney for Interstate Natural Gas Association of America

July 31, 1975

Certificate of Service

I certify that I have this day served the foregoing Amicus Curiae Brief of the Interstate Natural Gas Association of America in Support of Petitioner, on all parties to the proceedings in accordance with the requirements of this Court's Rule 33.

DATED at Washington, D. C., this 31st day of July, 1975.

/s/ JEROME J. MCGRATH
Jerome J. McGrath